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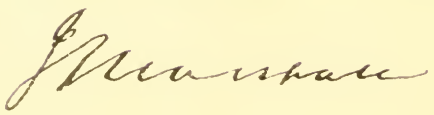

THE LIFE

OF

JOHN MARSHALL

BY

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Publishers' Note.

The constantly increasing interest in the life and services of Marshall make it appropriate at this time to issue in a single volume the excellent work by Mr. Flanders.

Originally issued in the author's "Lives and Times of the Chief Justices of the United States," Flanders' "Life of Marshall" has been generally acknowledged as one of the most comprehensive and authentic written, and has been variously referred to and quoted.

The publishers have thus been induced to think that, revised and reissued in separate form, this standard Life of Marshall would be a convenience to the reading public. Hence the present volume.

As a frontispiece is given an engraving reproducing the celebrated Inman portrait, which is generally regarded as the most satisfactory. It shows the Chief Justice in the later years of his life, and the original portrait, painted at the request of the Law Association of Philadelphia, may be seen in the library of the Association.

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THE

LIFE OF JOHN MARSHALL.

CHAPTER I.

HIS ANCESTRY.

John Marshall, the grandfather of Chief Justice Marshall, was a native of Wales, and emigrated to America about the year 1730. He settled in Westmoreland County, which, not inaptly, has been termed 'the Athens of Virginia' — Washington, Monroe, and the Lees having been born there. Here he married Elizabeth Markham, a native of England, who bore him four sons and five daughters.

John Marshall was a planter, but does not appear to have been a very prosperous one. His estate, called 'Forest,' though consisting of several hundred acres, was comparatively unproductive. It was inherited by his eldest son, Thomas, who subsequently removed to Fauquier County. He settled at a place called Germantown, and resided there for several years.

Thomas Marshall and Washington were born in the same neighborhood, were companions in boyhood, and friends ever after. Both became practical surveyors, and in the pursuits of a common profession, and after-

wards, in the service of a common country, their friendship and association were preserved. On the outbreak of the Revolution, Thomas Marshall was placed in command of the third Virginia regiment, serving as Continental troops, and in that capacity performed arduous and meritorious service. He was at Trenton and Brandywine, and in the latter battle bore a conspicuous part.

The natural abilities of Thomas Marshall were uncommonly vigorous, and were improved, not only by observation and reflection, but by extensive acquaintance with books. Though his means were limited, and his early advantages of education slight, he had purchased and made himself familiar with most of the standard works of English literature. By his neighbors and acquaintance he was held in the highest estimation for sound sense, and general ability. By his children he was equally beloved and admired. 'I have myself,' says Judge Story, 'often heard the Chief Justice speak of him in terms of the deepest affection and reverence. I do not here refer to his public remarks; but to his private and familiar conversations with me, when there was no other listener. Indeed, he never named his father, on these occasions, without dwelling on his character with a fond and winning enthusiasm. It was a theme on which he broke out with a spontaneous eloquence; and, in the spirit of the most persuasive confidence, he would delight to expatiate upon his virtues and talents. "My father," (would he say, with kindled feelings and emphasis,) "my father was a far abler man than any of his sons. To him I owe the solid foundation of all my own success in life."'[1]

[1] Discourse upon the Life, &c., of John Marshall.

About the time of his removal from Westmoreland to Fauquier County, Thomas Marshall married Miss Mary Keith, respecting whom we have been able to obtain only one or two trifling particulars. If, however, the character and talents of her children may be taken as the reflection of her own, she must have possessed great merit and understanding.

CHAPTER II.

1755—1775.

HIS BIRTH AND EDUCATION.

John Marshall, the eldest of fifteen children, was the son of Thomas and Mary Marshall, and born at a locality called Germantown, in Fauquier County, Virginia, on the 24th day of September, 1755. When he was quite young, the family moved to Goose's Creek, under Manassa's Gap, near the Blue Ridge, and still later to Oak Hill, where they were living at the commencement of the Revolution.[1] His father, a planter and surveyor like his friend Colonel Washington, led a very retired life, owing no doubt to the narrowness of his fortune, and the studiousness of his disposition. The region of country, too, in which he lived, was very sparsely settled; there were no schools in the neighborhood, and the duty of instructing his children chiefly devolved on him. How cheerfully and faithfully he performed it, the remark of the Chief Justice, which we have already quoted, that to his father he owed the solid foundation of all his success in life, is an ample testimony.

To him he was indebted for that love of literature, which continued fresh and warm down to the very closing scenes of his life. 'At the age of twelve [he]

[1] Howe's Virginia Historical Collections, page 262.

had transcribed the whole of Pope's Essay on Man, and some of his moral essays, and had committed to memory many of the most interesting passages of that distinguished poet. The love of poetry, thus awakened in his warm and vigorous mind, soon exerted a commanding influence over it. He became enamored of the classical writers of the old English school, of Milton, and Shakspeare, and Dryden, and Pope; and was instructed by their solid sense, and beautiful imagery. In the enthusiasm of youth, he often indulged himself in poetical compositions, and freely gave up his leisure hours to those dreamings with the muses, which (say what we may) constitute with many the purest source of pleasure in the gayer scenes of life, and the sweetest consolation in the hours of adversity.'[1]

In study, in healthful sports, and amidst the genial and virtuous influence of his home, the early boyhood of John Marshall passed happily away. He was particularly fortunate in being reared among numerous brothers and sisters. It has been often remarked that children growing up, under such circumstances, are the more apt, on that account, to make good men and women. They constitute a little community among themselves, and learn betimes that respect for social rights and duties, that mutual accommodation and forbearance, which fit them for useful and pleasant association in those corporate communities in which their lives are to be passed.

At fourteen, he was sent to Westmoreland, a hundred miles away, where he commenced the study of Latin. His teacher was the Rev. Mr. Campbell, a very respectable clergyman, with whom he remained a year. One of his fellow-students, a lad of far infe-

[1] Discourse on the Life, &c., of John Marshall, by Joseph Story.

rior capacity, but who afterwards became President of the United States, was James Monroe. On his return home, which was about the time of his father's removal to Oak Hill, young Marshall continued the study of Latin another year, under the Rev. Mr. Thompson, a Scotch clergyman, who had just settled in the parish, and resided in his father's family. This was all the aid he ever received from teachers in his study of the classics. With Mr. Thompson he had begun the reading of Horace and Livy; but how far his own unassisted efforts subsequently carried him, I am unable to say. As his stock of classical lore, however, was never very extensive, we may, perhaps, presume that, in the absence of classical tuition, he turned with more ardor to the study of English literature. Here he had the assistance and sympathy of his father, who was not only the kind and considerate parent, but the friend and companion of his son. 'My father,' thus he wrote long after, 'superintended the English part of my education, and to his care I am indebted for any thing valuable which I may have acquired in my youth. He was my only intelligent companion, and was both a watchful parent, and an affectionate, instructive friend. The young men within my reach were entirely uncultivated; and the time passed with them was devoted to hardy, athletic exercises.'

But not to study alone, nor to the companionship of such a father, is the eminence of John Marshall to be solely attributed. In addition to the native vigor of his faculties, much was owing to the circumstances amid which he grew up. In a thinly populated region of country, he had, necessarily, but little society, his mind was thrown upon itself, and his lonely meditations created and confirmed habits of thought and reflection. The wild and mountainous scenery, too, that

surrounded him, could not fail to affect a mind like his; reverent, and impressible to the varied charms of nature. The simple style of living, too, then common in that part of Virginia, the easy and friendly footing on which all social intercourse was conducted, were not lost on Marshall. Both were afterwards perceptible in his characteristic simplicity, and ready sympathy with humanity, in all its relations, without regard to rank or fortune, which, with his other qualities, so endeared him to his countrymen. 'He ever recurred with fondness to that primitive mode of life, when he partook, with a keen relish, balm tea and mush, and when the females used thorns for pins.'[1] He was fond of athletic exercises, and, naturally enough in a region abounding in game, of field sports also. These tastes and habits gave him a firm, robust constitution, and, even in his years, he exhibited the vigor and freshness of youth.

Having selected the law as his future profession, he began the study of it about the time he was entering on the eighteenth year of his age. He had not, however, made much progress in the perusal of Blackstone's Commentaries, before the threatening aspect of public affairs withdrew and concentrated his energies upon very different pursuits. In the next chapter, we shall view the future Chief Justice as a soldier.

[1] Howe's Virginia Historical Collections, page 263.

CHAPTER III.

1775–1780

HIS MILITARY SERVICES.

Times of Revolution are necessarily times of great intellectual activity. All minds are alert, anxious, and inquiring. Whether the cause of Revolution be political or religious, discussion and investigation are presupposed. Mankind are not apt to change existing establishments without very thorough conviction of the necessity of such change. And that conviction is not wrought in a day. Fixed habits, inherited attachments, interest in the past, and hopes in the future, all plead against innovation. When, therefore, all the various considerations that urge men to submit to the present order of things are overpowered by the weight of opposing considerations, it may readily be supposed that, in the conflict that has taken place, the minds of men have been thoroughly aroused, abstracted from ordinary pursuits, and fixed on objects of a larger and more comprehensive character.

It was in the midst of the fermentation and excitement immediately preceding actual hostilities between Great Britain and her American colonies, that John Marshall received his first lessons in practical politics. His father was a staunch Whig, who believed that the pretensions of Great Britain, if submitted to, would

result in the political enslavement of himself and posterity. The son could hardly fail to catch the tone and partake the sentiments of his father. But, whatever his natural bias, yet not blindly, nor with unreasoning facility, did he espouse the prevailing opinions. He investigated the grounds of the controversy. The various political essays of the day he read attentively. Full of youthful ardor, and looking forward to the time when discussion would give way to arms, he enrolled himself in a company of volunteers, in order to learn something of the rudiments of military science. In the spring of 1775 he was appointed Lieutenant in a militia company of the neighborhood, and, soon after, first Lieutenant in a company of minute-men. In this latter capacity, as we shall presently see, he was called into active service.

On the 20th of April, Lord Dunmore, in consequence of the hostile attitude of the Virginians, had the powder in the magazine at Williamsburg removed on board a man-of-war. This proceeding produced a feeling of great exasperation throughout Virginia, and was increased by the threat of Dunmore that he would fire Williamsburg, and proclaim freedom to the slaves, if injury should befall himself, or the officers who had acted in the execution of his orders. It was in the midst of the prevailing excitement, when the whole body of the people were fully aroused, that news arrived of the action at Lexington. This startling intelligence increased the ferment. An appeal to arms and the God of Hosts seemed now to be inevitable. It is at this critical moment that we have our first view of John Marshall. It is now that we get our first distinct impression of his youthful appearance. His company had assembled, according to previous notice, about ten miles from his father's residence. A kins-

man and cotemporary, who was present at their place of meeting, has thus described him as he then and there appeared: —

'It was in May, 1775. He was then a youth of nineteen. The muster-field was some twenty miles distant from the Court-house, and in a section of country peopled by tillers of the earth. Rumors of the occurrences near Boston had circulated with the effect of alarm and agitation, but without the means of ascertaining the truth, for not a newspaper was printed nearer than Williamsburg, nor was one taken within the bounds of the militia company, though large. The Captain had called the company together, and was expected to attend, but did not. John Marshall had been appointed Lieutenant to it. His father had formerly commanded it. Soon after Lieutenant Marshall's appearance on the ground, those who knew him clustered about him to greet him, others from curiosity and to hear the news.

'He proceeded to inform the company that the Captain would not be there, and that he had been appointed Lieutenant instead of a better; that he had come to meet them as fellow-soldiers, who were likely to be called on to defend their country, and their own rights and liberties, invaded by the British; that there had been a battle at Lexington, in Massachusetts, between the British and Americans, in which the Americans were victorious, but that more fighting was expected; that soldiers were called for, and that it was time to brighten their fire-arms, and learn to use them in the field; and that, if they would fall into a single line, he would show them the new manual exercise, for which purpose he had brought his gun,—bringing it up to his shoulder. The sergeants

put the men in line, and their fugleman presented himself in front to the right.

'His figure,' says his venerable kinsman, 'I have now before me. He was about six feet high, straight and rather slender, of dark complexion, showing little if any rosy red, yet good health, the outline of the face nearly a circle, and within that, eyes dark to blackness, strong and penetrating, beaming with intelligence and good nature; an upright forehead, rather low, was terminated in a horizontal line by a mass of raven-black hair of unusual thickness and strength; the features of the face were in harmony with this outline, and the temples fully developed. The result of this combination was interesting and very agreeable. The body and limbs indicated agility, rather than strength, in which, however, he was by no means deficient. He wore a purple or pale blue hunting shirt, and trowsers of the same material, fringed with white. A round black hat, mounted with the buck's-tail for a cockade, crowned the figure and the man. He went through the manual exercise by word and motion, deliberately pronounced and performed, in the presence of the company, before he required the men to imitate him; and then proceeded to exercise them, with the most perfect temper. Never did man possess a temper more happy, or, if otherwise, more subdued or better disciplined.

'After a few lessons, the company were dismissed, and informed that, if they wished to hear more about the war, and would form a circle around him, he would tell them what he understood about it. The circle was formed, and he addressed the company for something like an hour. I remember, for I was near him, that he spoke, at the close of his speech, of the minute battalion, about to be raised, and said he was

going into it, and expected to be joined by many of his hearers. He then challenged an acquaintance to a game of quoits, and they closed the day with foot-races and other athletic exercises, at which there was no betting. He had walked ten miles to the muster-field, and returned the same distance on foot to his father's house at Oak Hill, where he arrived a little after sunset.'[1]

Thus and so was John Marshall, in the freshness of youth, and thus, in the main, did he continue through life. The same simplicity, naturalness, good nature, happy temperament, open, manly, and sincere disposition, were at all times remarked, and secured to him the unaffected love of his countrymen. They could admire the exhibition of his pre-eminent talents, but qualities like these were needed to attract and fix the affection of their hearts.

The occurrences to the northward, and the hostile attitude of parties at home, the liability and expectation of being called into immediate service, induced the volunteers of Culpepper, Orange, and Fauquier Counties, to constitute themselves a regiment of minute men. This was, doubtless, the organization to which young Marshall referred, in his address to the militia, as about to be formed. They were the first minute men raised in Virginia, and numbered about three hundred and fifty men. Lawrence Taliaferro was chosen their Colonel, Edward Stevens, Lieutenant-Colonel, and Thomas Marshall, the father of the Chief Justice, Major. The future Chief Justice himself received the appointment of first Lieutenant in one of the companies of this regiment.

[1] Eulogy on John Marshall by Horace Binney, pp. 22–24.

These were the citizen soldiery, who, John Randolph said in the Senate of the United States, in one of his discursive speeches, 'were raised in a minute, armed in a minute, marched in a minute, fought in a minute, and vanquished in a minute.' Their appearance was calculated to strike terror into the hearts of an enemy. They were dressed in green hunting-shirts, 'home-spun, home-woven, and home-made,' with the words, '*Liberty or Death*,' in large white letters, on their bosoms. 'They wore in their hats buck-tails, and in their belts, tomahawks and scalping-knives. Their savage, warlike appearance, excited the terror of the inhabitants as they marched through the country to Williamsburg.'[1] Lord Dunmore told his troops before the action at the Great Bridge, which we shall presently describe, that if they fell into the hands of the *shirt-men*, they would be scalped; an apprehension, it is said, which induced several of them to prefer death to captivity. To the honor of the *shirt-men*, however, it should be observed, that they treated the British prisoners with great kindness — a kindness which was felt and gratefully acknowledged.

Early in June, Lord Dunmore, apprehensive of his personal safety, fled on board a man-of-war. With the British shipping, off the coast of Virginia, at his command, he possessed the means of annoying the Virginians, without being able to strike any very effective blow. Through the summer and autumn of 1775, both parties were kept upon the alert, but nothing of a very serious character occurred. At length, on the 7th of November, Dunmore proclaimed martial law, denounced as traitors all who were capable of bearing arms and did not resort to His Majesty's standard,

[1] Howe's Virginia Historical Collections, p. 238.

and offered freedom to all slaves 'appertaining to rebels' who would join His Majesty's troops. He set up his standard in Norfolk and Princess Anne, prescribed an oath of allegiance, and, from among the Loyalists, received a considerable accession to his force.

At Suffolk, eighteen miles south-west of Norfolk, the Virginians had collected provisions for their troops. To capture these provisions was an object of importance to Lord Dunmore. To prevent it, was an object of equal importance to the Virginians. The Provisional Government had kept a steady eye on his lordship's movements, and clearly perceived the danger of permitting him to retain a foothold at Norfolk. They despatched Colonel Woodford, with a detachment of minute men, including Marshall's company, to protect the provisions at Suffolk, and relieve Norfolk from the presence of the enemy. The engagement which we are now to relate, was the result.

About twelve miles from Norfolk, on the only practicable road to Suffolk, was the Great Bridge, as it was termed, and built over the southern branch of Elizabeth River. Here Dunmore, apprised of Woodford's movements, erected a stockade fort, and supplied it with a numerous artillery. The position was a strong one, surrounded on all sides by water and marshes, and only accessible by a long dike. This was commanded by his cannon, as well as the bridge and the causeway on the other side, over which the Americans must pass. The Governor's troops, however, were not equal to his intrenchments. They consisted of two hundred regulars, a corps of Norfolk Loyalists, and 'a shapeless mass of varlets of every color.' [1]

[1] Botta.

When Woodford arrived at the bridge, he threw up a breastwork at the extremity of the causeway on his side. Neither party seemed disposed to begin the attack. Several days passed, without any serious movement on either side. In numbers and character, the Virginians were much superior to the enemy. True, for the most part, they were unused to warfare, but being chiefly young men, they were full of enthusiasm, and ready for action. It was here and now, that Lieutenant Marshall had his first experience of war. In the action which ensued, he is said to have borne an honorable part.

The enemy were induced to begin the attack by stratagem. A servant of Major Marshall's, after being instructed in the part he was to play, deserted to the enemy, and reported that there were not at the bridge more than three hundred *shirt-men*. This tale Lord Dunmore believed, and accordingly despatched his regular troops, together with about three hundred blacks and Loyalists, to drive the Virginians from their position. The attack was made on the 9th of December. Captain Fordyce, a brave and accomplished officer, led the attacking party. As they advanced along the causeway to storm the breastwork, they were exposed to the deadly fire of the American riflemen. The effect was overwhelming. The action did not last more than twenty or thirty minutes; but the enemy were totally routed. Lord Dunmore abandoned his intrenchments, spiked his cannon, and again fled to his ships.

On the fourteenth, the Americans entered Norfolk. Here Marshall remained with his corps, until the town was bombarded and burned by the British shipping, on the 1st of January following.

In July, 1776, he was appointed first Lieutenant in

the eleventh Virginia regiment, and, in the following winter, joined the army in camp at Morristown. That army, notwithstanding the successes at Trenton and Princeton, was in the most wretched condition, both as to numbers and *materiel*. Washington's letter to the Governor and Council of Connecticut, describing the actual state of affairs, is said to have drawn tears from those who heard it read.[1] 'Nothing but a good face and false appearances,' he subsequently wrote, 'have enabled us hitherto to deceive the enemy respecting our strength.'[2]

It was the fortune of young Marshall to follow the standard of his country in the gloomiest period of the war; a period, when patient endurance of suffering was the highest quality the soldier could display. In May, when the campaign of 1777 was about opening, he received the appointment of Captain. In this subordinate post he was not in a position to attract the eye of the historian, and, consequently, we are without any detailed account of his actual conduct in the field. Suffice it to say, therefore, that he was engaged in the action at Iron Hill, which preluded the Battle of Brandywine, when the corps to which he was attached did memorable service. Indeed, the Virginia troops behaved, in this battle, with the greatest gallantry, and merited universal praise. But the victory, or the results of victory, remained with the British. In the course of a few days, General Howe made his triumphal entry into Philadelphia.[3]

Then followed the Battle of Germantown,[4] a battle which would have resulted in favor of the Americans, had not victory been snatched from their grasp, in

[1] Gordon, vol. ii., p. 170.
[2] Ibid., p. 198.
[3] September 26th, 1777.
[4] October 3d, 1777.

the manner thus described by one of the American Generals. 'At Germantown,' he says, 'fortune smiled on our arms for hours. The enemy were broke, dispersed, and flying on all quarters; we were in possession of their whole encampment, together with their artillery park, &c. A *wind-mill* attack was made on a house into which six light companies had thrown themselves to avoid our bayonets; this gave time to the enemy to rally; our troops were deceived by this attack; taking it for something formidable, they fell back to assist in what they deemed a serious matter. The enemy finding themselves no further pursued, and believing it to be a retreat, followed. Confusion ensued, and we ran away from the arms of victory ready to receive us.'[1]

Marshall was with the column that halted to attack Chew's House — an attack to which the ill success of the day is undoubtedly attributable. No further serious engagement took place between the two armies during this campaign; and on the 19th of December, Washington, with his exhausted troops, went into winter quarters at Valley Forge. The cold was extreme; yet his men were without clothes to cover their nakedness, without blankets to lie on, and without shoes, so that their marches could be traced by the blood from their feet. They were as often without provisions as with. But these men, taking up their winter quarters within a day's march of the enemy, without a house or hut to cover them, till they could be built, pinched by hunger, and stiffened by cold, submitted to hardships and privations like these without a murmur. Well might Washington declare without arrogance, or the smallest deviation from truth, 'that no history, now extant,

[1] Gordon, vol. ii., p. 235.

can furnish an instance of an army's suffering such uncommon hardships as ours has done, and bearing them with the same patience and fortitude.'[1]

Marshall's mess-mates, during this memorable winter, were Lieutenant Robert Porterfield, Captain Charles Porterfield, Captain Johnson, and Lieutenant Philip Slaughter. The latter has described the sufferings they endured from want of food and clothing. 'Most of the officers gave to their almost naked soldiers nearly the whole of their clothing, reserving only that they themselves had on. Slaughter was reduced to a single shirt. While this was being washed, he wrapped himself in a blanket. From the breast of his only shirt he had wrist-bands and a collar made, to complete his uniform for parade. Many of his brother officers were still worse off, having no under garment at all; and not one soldier in five had a blanket. They all lived in rude huts, and the snow was knee-deep the whole winter. Washington daily invited the officers, in rotation, to dine with him at his private table; but, for want of decent clothing, few were enabled to attend. Slaughter being so much better provided, frequently went in place of others, that, as he said, "his regiment might be represented." While in this starving condition, the country people brought food to the camp. Often the Dutch women were seen riding in, sitting on bags on their horses' backs, holding two or three bushels each of apple pies, baked sufficiently hard to be thrown across the room without breaking. These were purchased eagerly, eaten with avidity, and considered a great luxury.'

Slaughter says, 'Marshall was the best-tempered man he ever knew. During their sufferings at Valley

[1] Washington's Writings, vol. v., pp. 321, 329.

Forge, nothing discouraged, nothing disturbed him; if he had only bread to eat, it was just as well; if only meat, it made no difference. If any of the officers murmured at their deprivations, he would shame them by good-natured raillery, or encourage them by his own exuberance of spirits. He was an excellent companion; and idolized by the soldiers, and his brother officers, whose gloomy hours were enlivened by his inexhaustible fund of anecdote.'[1]

A further testimony, as to the estimation in which he was held by his brother officers, is found in the following extract. 'When the writer of this article first saw him,' says a cotemporary, 'he held the commission of Captain in that regiment.[2] It was in the trying, severe winter of 1777–8, a few months after the disastrous battles of Brandywine and Germantown had tested his firmness, hardihood, and heroism. The spot where we acquired our earliest information of him, was the famous hutted encampment at Valley Forge, about thirty miles from Philadelphia. By his appearance then, we supposed him about twenty-two or twenty-three years of age. Even so early in life, we recollect that he appeared to us *primus inter pares*, for, amidst the many commissioned officers, he was discriminated for superior intelligence. Our informant, Colonel Ball, of another regiment in the same line, represented him as a young man, not only brave, but signally intelligent. Indeed, all those who intimately knew him, affirmed that his capacity was held in such estimation by many of his brother officers, that, in many disputes of a certain description, he was constantly chosen arbiter; and that officers, irritated by

[1] Howe's Virginia Historical Collections, pp. 239, 266. See note A

[2] Eleventh Virginia Regiment.

differences, or animated by debate, often submitted the contested points to his judgment, which, being in writing, and accompanied, as it commonly was, by sound reasons in support of his decision, obtained general acquiescence.'[1]

He was often employed, during this period of his military life, as Deputy Judge Advocate. The performance of the duties of this post extended his acquaintance among the officers of the army. It was now that he became acquainted with Colonel Hamilton, who was acting as aid-de-camp of the Commander-in-chief. 'Of Hamilton,' says Judge Story, 'he always spoke in the most unreserved manner, as a soldier and statesman of consummate ability; and, in point of comprehensiveness of mind, purity of patriotism, and soundness of principles, as among the first that had ever graced the councils of any nation. His services to the American Republic he deemed to have been of inestimable value, and such as had eminently conduced to its stability, its prosperity, and its true glory.'[2] But, notwithstanding the deep respect he always entertained for Hamilton, 'whose unreserved friendship, at a subsequent period of his life, he familiarly enjoyed,' we shall hereafter see that, when the man by whose hand he had fallen, was brought before him on a charge of treason, he held the scales of justice with so nice a poise, he held up before the prisoner the shield of the law with so firm a hand, that if it did not excite the surprise, at least, provoked the indignation of the Chief Executive Magistrate, who pressed the conviction of Burr with a zeal that seemingly had its root in vindictiveness.

[1] North American Review for January, 1828, p. 8.

[2] Story's Discourse on the Life, &c., of John Marshall, p. 16

The possession of Philadelphia promised so little advantage to the Royal forces, and, indeed, exposed them to such danger, that the British Ministry sent out orders, in the spring of 1778, for its speedy evacuation. These orders reached Sir Henry Clinton, who had superseded Sir William Howe, early in June. He immediately addressed himself to the task of executing them. In the night of the 18th, the city was evacuated. The American army was immediately put in motion, with the view to harass and impede the progress of the enemy.

Marshall was in the Battle of Monmouth, which succeeded. He remained with the army through the campaign, as well as during the following winter. In the campaign of 1779, it was his fortune to be connected with or engaged in two of the most brilliant actions that distinguished it. He was with Wayne at the assault of Stony Point, on the night of the 16th of June, and with the detachment to cover the retreat of Major Lee, after his surprise of the enemy's post at Powle's Hook, on the 19th of July; an enterprise which threw a lustre upon the American arms. He continued with the army until the close of the year, when a part of the Virginia line was sent to South Carolina, to co-operate in the defence of that State. It so happened, that he was attached to the other part, whose term of enlistment now expired. Being thus without command, he, with other supernumeraries, was directed to return home, in order to take charge of such men as the State might raise for them.

No further opportunity for active military service occurred, until the arrival in Virginia of the British army under General Leslie, in October, 1780. Captain Marshall now joined the small force under Baron Steuben, who had been left by General Greene, (while

on his way to assume the command of the Southern army,) to direct the defence of the State. General Leslie, however, finding that Lord Cornwallis could not effect a junction with him, an object which was essential to the success of the plan for the reduction of Virginia, finally sailed for Charleston.

Late in December, the State was again invaded by Arnold. Marshall joined the forces collected to oppose him, and continued in service until Arnold retired to Portsmouth, in the latter part of the following January. As there was still a redundancy of officers in the Virginia line, he now resigned his commission; and for the future we shall view him in a different walk of life.

NOTE A. See page 19. In a letter to the author, the late Josiah Quincy thus writes of Marshall:

"With Marshall I had considerable acquaintance during the eight years I was a member of Congress, from 1805 to 1813, played chess with him, and never failed to be impressed with the frank, cordial, child-like symplicity, and unpretending manner of the man, of whose strength and breadth of intellectual power I was, even at that early period of his professional life, well apprised. In one of the above-mentioned years, I dined at Georgetown with John Randolph and a large company of Virginians and other Southern gentlemen. The conversation turned to Judge Marshall, of whom the Virginians were very proud, altho' some, if not all of them, did not coincide with his well-known political faith. All, however, were loud in his praises, and anecdotes were told of his early life, and particularly of his athletic powers; among others I remember it was said that he surpassed in them any man in the army; that when the soldiers were idle at their quarters, it was usual for the officers to engage in matches at quoits, or in jumping and racing. That in these exercises Marshall excelled all his competitors; that he would throw a quoit further, and beat at a race, any other; that he was the only man who, with a running jump, could clear a stick laid over the heads of two men as tall as himself. On one occasion he ran in his stocking feet, with a comrade, and his mother in knitting his stockings had the legs of blue yarn and the heels of white. This circumstance, combined with his uniform success in the race, led the soldiers, who always were present at these races, to give him the *sobriquet* of '*Silverheels*,' the name by which he was generally known among them."

CHAPTER IV.

HIS PRACTICE AT THE BAR.

1781 — 1799.

During the season of inaction following his return to Virginia, in the winter of 1779–80, Marshall resumed the study of the law. He attended, at William and Mary's College, a course of law lectures by Mr. Wythe, better known afterwards as Chancellor Wythe, and lectures upon natural philosophy by Mr. Madison, then President of the College, and subsequently Bishop of Virginia. He was connected with the institution until the summer vacation of 1780, and soon after was admitted to the Bar. But, in the tumult of war, the courts of law were suspended in Virginia, and not re-opened until after the capture of Cornwallis, in October, 1781. From the termination of Arnold's invasion, when he resigned his commission, until he began his practice upon the re-opening of the Courts, Marshall devoted himself, with unremitting attention, to the study of his future profession.

It was at this period of his life, either in the summer of 1780 or 1781, that he undertook a journey to Philadelphia on foot, in order to be inoculated for the small-pox. He walked at the rate of thirty-five miles a day. On his arrival, such was his shabby appearance, that he was refused admission into one of the hotels; his long beard, and worn-out garments, proba-

bly suggesting the idea that his purse was not adequate to his entertainment.[1] But to the man who had undergone the hardships of Morristown and Valley Forge, who had been reduced almost to nakedness, any garb that served the purpose of a covering, must have seemed sufficient for any occasion. In truth, he was at all times careless of his dress, particularly in early life; and once, as we shall presently relate, lost a generous fee in consequence.

He began his professional career in Fauquier, his native county; but, in the course of two years, removed to Richmond, where he continued to reside until his death. His stock of legal knowledge, as we may infer from the short time he had devoted to its acquisition, was not very extensive; but it was said of the Virginians, more than a hundred and fifty years ago, that, being naturally of good parts, they neither require nor admire as much learning as they do in Britain.[2] At any rate, such was the felicity of Marshall's understanding, that on a slender foundation of legal science he soon raised himself to the highest reputation in his profession. He attributed his early success at the Bar to the friendship of his old com-

[1] Southern Literary Messenger, vol. ii., p. 183.

[2] 'The Present State of Virginia; by Hugh Jones, A.M., Chaplain to the Honorable Assembly, and lately Minister of Jamestown, in Virginia.' The Reverend author seems to have been charmed with his residence among the Virginians, and thus asserts their superiority over all the other colonists:—'If New England,' he says, 'be called a receptacle of Dissenters, and an Amsterdam of religion, Pennsylvania a nursery of Quakers, Maryland the retirement of Roman Catholics, North Carolina the refuge of runaways, and South Carolina the delight of Buccaneers and Pyrates, Virginia may be justly esteemed the happy retreat of true Britons, and true churchmen for the most part; neither soaring too high, nor dropping too low, consequently should merit the greater esteem and encouragement.'

panions in arms. 'They knew,' he would say, 'that I felt their wrongs, and sympathized in their sufferings, and had partaken of their labors, and that I vindicated their claims upon their country with a warm and constant earnestness.'[1] We have seen how strong was their attachment to him. 'I myself,' says Judge Story, 'have often heard him spoken of by some of these veterans in terms of the warmest praise. In an especial manner the Revolutionary officers of the Virginia line (now "few and faint, but fearless still") appeared almost to idolize him, as an old friend and companion in arms, enjoying their unqualified confidence.'[2]

They knew his abilities, his integrity, and loved him for the goodness of his heart. Strangers, on the contrary, judging from external appearances, might not so readily have given him credit for qualities that would insure success at the Bar. For, though easy, frank, friendly, and cordial in his manners, and social in his habits, he was yet negligent in his dress, not very studious, and with nothing in his exterior to attract clients. The following anecdote is characteristic of his rustic appearance, at a time when his comprehension and grasp of mind had already attracted the attention of the Bench and Bar, and he was advancing with sure steps to the head of his profession. He 'was one morning strolling through the streets of Richmond, attired in a plain linen roundabout and shorts, with his hat under his arm, from which he was eating cherries, when he stopped in the porch of the Eagle hotel, indulged in some little pleasantry with the landlord, and then passed on. Mr. P., an elderly

[1] New York Review, vol. iii., p. 333.

[2] Discourse upon the Life, &c., of John Marshall, p. 16.

gentleman from the country, then present, who had a case coming on before the Court of Appeals, was referred by the landlord to Marshall, as the best advocate for him to employ; but the careless, languid air of the young lawyer had so prejudiced Mr. P., that he refused to engage him. On entering Court, Mr. P. was a second time referred by the Clerk of the Court, and a second time he declined. At this moment entered Mr. V., a venerable-looking legal gentleman, in a powdered wig and black coat, whose dignified appearance produced such an impression on Mr. P. that he at once engaged him. In the first case which came on, Marshall and Mr. V. each addressed the Court. The vast inferiority of his advocate was so apparent, that, at the close of the case, Mr. P. introduced himself to young Marshall, frankly stated the prejudice which had caused him, in opposition to advice, to employ Mr. V.; that he extremely regretted his error, but knew not how to remedy it. He had come into the city with one hundred dollars, as his lawyer's fee, which he had paid, and had but five left, which, if Marshall chose, he would cheerfully give him, for assisting in the case. Marshall, pleased with the incident, accepted the offer, not, however, without passing a sly joke at the *omnipotence* of a powdered wig and black coat.'[1]

Marshall's rise at the Bar was rapid. Once placed in the line of employment, his extraordinary talents could hardly fail to make the same impression on whoever witnessed their display, as on Mr. P.. For, without possessing scarcely a single attribute that we naturally ascribe to the orator, without beauty of style, melody of voice, grace of person, or charm of manner, he, nevertheless, was as distinguished as an advocate,

[1] Howe's Virginia Historical Collections, p. 266.

as he afterwards became as a judge. The qualities that gave him such pre-eminence at the Bar are thus delineated by the graceful pen of Mr. Wirt: —

'This extraordinary man,' says Mr. Wirt, 'without the aid of fancy, without the advantages of person, voice, attitude, gesture, or any of the ornaments of an orator, deserves to be considered as one of the most eloquent men in the world; if eloquence may be said to consist in the power of seizing the attention with irresistible force, and never permitting it to elude the grasp, until the hearer has received the conviction which the speaker intends. His voice is dry and hard; his attitude, in his most effective orations, was often extremely awkward; while all his gesture proceeded from his right arm, and consisted merely in a perpendicular swing of it, from about the elevation of his head to the bar, behind which he was accustomed to stand. As to fancy, if she hold a seat in his mind at all, his gigantic genius tramples with disdain on all her flower-decked plats and blooming parterres. How then, you will ask, how is it possible, that such a man can hold the attention of an audience enchained through a speech of even ordinary length? I will tell you. He possesses one original, and almost supernatural faculty; the faculty of developing a subject by a single glance of his mind, and detecting at once the very point on which every controversy depends. No matter what the question; though ten times more knotty than "the gnarled oak," the lightning of heaven is not more rapid, or more resistless, than his astonishing penetration. Nor does the exercise of it seem to cost him an effort. On the contrary, it is as easy as vision. I am persuaded, that his eyes do not fly over a landscape, and take in its various objects

with more promptitude and facility, than his mind embraces and analyzes the most complex subject.

'Possessing, while at the Bar, this intellectual elevation, which enabled him to look down and comprehend the whole ground at once, he determined immediately, and without difficulty, on which side the question might be most advantageously approached and assailed. In a bad cause, his art consisted in laying his premises so remotely from the point directly in debate, or else in terms so general and so specious, that the hearer, seeing no consequence which could be drawn from them, was just as willing to admit them as not; but, his premises once admitted, the demonstration, however distant, followed as certainly, as cogently, as inevitably, as any demonstration in Euclid. All his eloquence consists in the apparently deep self-conviction, and emphatic earnestness of his manner; the correspondent simplicity and energy of his style; the close and logical connection of his thoughts; and the easy gradations by which he opens his lights on the attentive minds of his hearers. The audience are never permitted to pause for a moment. There is no stopping to weave garlands of flowers, to hang in festoons around a favorite argument. On the contrary, every sentence is progressive; every idea sheds new light on the subject; the listener is kept perpetually in that sweetly pleasurable vibration, with which the mind of man always receives new truths; the dawn advances with easy but unremitting pace; the subject opens gradually on the view; until, rising, in high relief, in all its native colors and proportions, the argument is consummated, by the conviction of the delighted hearer.'[1]

[1] The British Spy, pp. 178–181

If Marshall, as he first appeared at the Bar, did not bear a finished resemblance to the picture thus sketched by Mr. Wirt nearly a quarter of a century after, he certainly possessed the more striking outlines of it. Strength, cogency of reasoning, was the characteristic excellence of all his intellectual displays. His maxim seems always to have been, 'aim exclusively at strength.' Of eloquence, in the usual sense, he evidently was not emulous, and, perhaps, not capable. His object was to convince, and he sought to do this in the most direct and simple manner. It was always remarkable of him, says Wirt, 'that he almost invariably seized one strong point only, the pivot of the controversy; this point he would enforce with all his powers, never permitting his own mind to waver, nor obscuring those of his hearers by a cloud of inferior, unimportant considerations.'[1] This 'convincing eloquence,' which he so pre-eminently possessed, 'is infinitely more serviceable to its possessor than the most florid harangue, or the most pathetic tones that can be imagined; and the man who is thoroughly convinced himself, who understands his subject, and the language he speaks in, will be more apt to silence opposition, than he who studies the force of his periods, and fills our ears with sounds, while our minds are destitute of conviction.'[2]

The period succeeding the Revolutionary War witnessed a great accession of business in the Courts. Outstanding debts, unfulfilled contracts, together with the mutations property had undergone amid the conflicts of a long war, were fruitful sources of litigation. 'Does not every gentleman here know' demanded Marshall in the Virginia Convention of 1788, when

[1] The British Spy, p. 211. [2] The Bee, No. VI.

maintaining the necessity of a Federal Judiciary, 'that the causes in our Courts are more numerous than they can decide, according to their present construction? Look at the dockets. You will find them crowded with suits, which the life of man will not see determined. If some of these suits be carried to other Courts, will it be wrong? They will still have business enough.'

It was a period not only of profitable employment to the Bar, but a period calculated to stimulate the highest energies of their minds. The fair fabric of American jurisprudence was yet unreared. The law was in an unsettled state. Questions of novel character occupied the attention of the Courts; questions to be settled, not by the weight of authority, but by the light of reason. It was in the investigation and argument of causes like these, where the advocate was neither aided nor impeded by precedents; where he was compelled to rely on the unassisted powers of his own mind; to support his own thoughts, rather than quote the thoughts of others, that the great abilities of Marshall found an adequate theatre for their employment and display.

When the Federal Judiciary was established, the sphere of his practice was enlarged. Several of the causes in which he was engaged possessed great public interest, and attracted universal attention. The fame of his arguments spread through the Union. Ware *versus* Hylton, familiarly known as the British debt case, was one of the causes in which he particularly distinguished himself. It came on for trial at the Circuit Court of the United States at Richmond, in 1793; Chief Justice Jay, Judge Iredell, and Griffin, the Judge of the District Court, holding the term. Patrick Henry, Marshall, Alexander Campbell, and James

Innis, appeared for the American debtors; and Andrew Ronald, John Wickham, 'the eloquent, the witty, and the graceful," and Starke, and Baker, for the English creditors.

The question was, whether the treaty of peace, which provided that creditors on either side should meet with no *lawful impediment* to the recovery of the full value of all *bona fide* debts theretofore contracted, revived debts which had been sequestered during the war by an act of the Virginia Legislature.

The eminence of the counsel, as well as the extensive interests to be affected by the decision of the Court, brought together an eager and expectant audience. The Countess of Huntington, then in this country, was present during the trial, and remarked, after hearing the several speakers, 'that if every one of them had spoken in Westminster Hall, they would have been honored with a peerage.'[1] 'The cause,' said Judge Iredell, 'has been spoken to, at the Bar, with a degree of ability equal to any occasion. However painfully I may at any time reflect on the inadequacy of my own talents, I shall, as long as I live, remember with pleasure and respect the arguments which I have heard in this case. They have discovered an ingenuity, a depth of investigation, and a power of reasoning fully equal to any thing I have ever witnessed, and some of them have been adorned with a splendor of eloquence surpassing what I have ever felt before. Fatigue has given way under its influence, and the heart has been warmed, while the understanding has been instructed.'[2]

Patrick Henry shone, on this occasion, with unsur-

[1] Howe's Virginia Historical Collections, p. 221.

[2] Dallas' Reports, vol. iii., p. 257.

passed splendor. His vivid feelings, that irresistible charm of his eloquence, were fully aroused, and enlisted in the cause. He made unwonted preparation for the trial; shutting himself up in his office for three days, during which time he did not see even his family; his food being handed by a servant through the office-door.[1] His argument occupied the attention of the Court during three days. He had a diamond ring on his finger, and, while he was speaking, the Countess of Huntington exclaimed to Judge Iredell, who had never before heard him, 'The diamond is *blazing!*' 'Gracious God!' replied he, 'he is an orator indeed.' In this cause he injured his voice so that it never recovered its original power.[2]

We have no abstract of Marshall's argument on this occasion, and shall not attempt to supply its place by resorting to conjecture. Its character, however, may be surmised by his subsequent argument before the Supreme Court of the United States, whither the cause was carried by writ of error. His colleague in the trial before the latter tribunal was Alexander Campbell. It was, doubtless, to the arguments on this occasion to which Wirt refers in the following extract of a letter to his friend Gilmer. He speaks of them, however, as having been made in the cause which turned on the constitutionality of the carriage tax, a cause, indeed, which was heard at the same term of the Court; but Marshall was not one of the counsel.

'From what I have heard of Campbell,' says Wirt, 'I believe that, for mere eloquence, his equal has never been seen in the United States. He and the

[1] Virginia Historical Collections, *supra*.

[2] Ibid. See also Wirt's Patrick Henry, for abstract of his argument

Chief Justice went to Philadelphia to argue a cause which turned on the constitutionality of the carriage tax. It was somewhere about 1795 or 1796. They were opposed by Hamilton, Lewis, and others. Campbell played off his Appollonian airs; but they were lost. Marshall spoke, as he always does, to the judgment merely, and for the simple purpose of convincing. Marshall was justly pronounced one of the greatest men of the country. He was followed by crowds, looked upon, and courted with every evidence of admiration and respect for the great powers of his mind. Campbell was neglected and slighted, and came home in disgust. Marshall's maxim seems always to have been, "aim exclusively at strength;" and from his eminent success, I say, if I had my life to go over again, I would practice on his maxim with the most rigorous severity, until the character of my mind was established.'[1]

Marshall's argument, as preserved in the report of the case, will now claim our attention: —

'The case resolves itself,' said he, 'into two general propositions. First, That the Act of Assembly of Virginia is a bar to the recovery of the debt, independent of the treaty. Secondly, That the treaty does not remove the bar.

'That the Act of Assembly of Virginia is a bar to the recovery of the debt, introduces two subjects for consideration: —

'First, Whether the Legislature had power to extinguish the debt? Secondly, Whether the Legislature had exercised that power?

[1] Kennedy's Wirt, vol. ii., p. 83.

'First. It has been conceded, that independent nations have, in general, the right of confiscation; and that Virginia, at the time of passing her law, was an independent nation. But, it is contended, that, from the peculiar circumstances of the war, the citizens of each of the contending nations having been members of the same government, the general right of confiscation did not apply, and ought not to be exercised. It is not, however, necessary for the defendant in error to show a parallel case in history; since it is incumbent on those who wish to impair the sovereignty of Virginia, to establish, on principle, or precedent, the justice of their exception. That State being engaged in a war, necessarily possessed the powers of war; and confiscation is one of those powers, weakening the party against whom it is employed, and strengthening the party that employs it. War, indeed, is a state of force; and no tribunal can decide between the belligerent powers. But did not Virginia hazard as much by the war, as if she had never been a member of the British empire? Did she not hazard more, from the very circumstance of its being a civil war? It will be allowed, that nations have equal powers; and that America, in her own tribunals at least, must, from the 4th of July, 1776, be considered as independent a nation as Great Britain. Then, what would have been the situation of American property, had Great Britain been triumphant in the conflict? Sequestration, confiscation, and proscription would have followed in the train of that event; and why should the confiscation of British property be deemed less just in the event of the American triumph? The rights of war clearly exist between members of the same empire, engaged in a civil war.

'But, suppose a suit had been brought, during the

war, by a British subject against an American citizen, it could not have been supported; and, if there was a power to suspend the recovery, there must have been a power to extinguish the debt. They are, indeed, portions of the same power, emanating from the same source. The legislative authority of any country can only be restrained by its own municipal constitution. This is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the Constitution. It is not necessary to inquire how the judicial authority should act, if the Legislature were evidently to violate any of the laws of God; but property is the creature of civil society, and subject, in all respects, to the disposition and control of civil institutions. . . . .

'But it is now to be considered, whether, if the Legislature of Virginia had the power of confiscation, they have exercised it? The third section of the Act of Assembly discharges the debtor; and, on the plain import of the term, it may be asked, if he is discharged, how can he remain charged? The expression is, he shall be discharged from the debt; and yet, it is contended he shall remain liable to the debt. Suppose the law had said, that the debtor should be discharged from the Commonwealth, but not from his creditor, would not the Legislature have betrayed the extremest folly in such a proposition? and what man in his senses would have paid a farthing into the treasury under such a law? Yet, in violation of the expressions of the Act, this is the construction which is now attempted.

'It is, likewise, contended, that the Act of Assembly does not amount to a confiscation of the debts paid into the treasury; and that the Legislature had no

power, as between creditors and debtors, to make a substitution, or commutation, in the mode of payment. But, what is a confiscation? The substance, and not the form, is to be regarded. The State had a right either to make the confiscation absolute, or to modify it as she pleased. If she had ordered the debtor to pay the money into the treasury, to be applied to public uses, would it not have been, in the eye of reason, a perfect confiscation? She has thought proper, however, only to authorize the payment, to exonerate the debtor from his creditor, and to retain the money in the treasury, subject to her own discretion, as to its future appropriation. As far as the arrangement has been made, it is confiscatory in its nature, and must be binding on the parties; though, in the exercise of her discretion, the State might choose to restore the whole, or any part, of the money to the original creditor. Nor is it sufficient to say, that the payment was voluntary, in order to defeat the confiscation. A law is an expression of the public will; which, when expressed, is not the less obligatory, because it imposes no penalty. . . .

'Having thus, then, establised that, at the time of entering into the treaty of 1783, the defendant owed nothing to the plaintiff, it is next to be inquired, whether that treaty revived the debt in favor of the plaintiff, and removed the bar to a recovery, which the law of Virginia had interposed? The words of the fourth article of the treaty are, "that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted." Now, it may be asked, who are creditors? There cannot be a creditor where there is not a debt; and British debts were extinguished by the act of confiscation. The articles, there-

fore, must be construed with reference to those creditors who had *bona fide* debts subsisting, in legal force, at the time of making the treaty; and the word recovery can have no effect to create a debt, where none previously existed. Without discussing the power of Congress to take away a vested right by treaty, the fair and rational construction of the instrument itself is sufficient for the defendant's cause. The words ought, surely, to be very plain, that shall work so evident a hardship, as to compel a man to pay a debt which he had before extinguished. The treaty itself does not point out any particular description of persons who were to be deemed debtors; and it must be expounded in relation to the existing state of things.

'It is not true, that the fourth article can have no meaning, unless it applies to cases like the present. For instance — there was a law of Virginia, which prohibited the recovery of British debts, that had not been paid into the treasury. These were *bona fide* subsisting debts; and the prohibition was a legal impediment to the recovery, which the treaty was intended to remove. So, likewise, in several other States, laws had been passed authorizing a discharge of British debts in paper money, or by a tender of property at a valuation, and the treaty was calculated to guard against such impediments to the recovery of the sterling value of those debts. It appears, therefore, that, at the time of making the treaty, the state of things was such, that Virginia had exercised her sovereign right of confiscation, and had actually received the money from the British debtors. If debts thus paid were within the scope of the fourth article, those who framed the article knew of the payment; and, upon every principle of equity and law, it ought to be presumed, that the recovery, which they contemplated,

was intended against the receiving State, not against the paying debtor. Virginia possessing the right of compelling a payment for her own use, the payment to her, upon her requisition, ought to be considered as a payment to the attorney, or agent, of the British creditor. Nor is such a substitution a novelty in legal proceedings; a foreign attachment is founded upon the same principle. . . .

'This Act of Virginia must have been known to the American and British Commissioners; and, therefore, cannot be repealed without plain and explicit expressions directed to that object. Besides, the public faith ought to be preserved. The public faith was plighted by the Act of Virginia; and, as a revival of the debt in question would be a shameful violation of the faith of the State to her own citizens, the treaty should receive any possible interpretation to avoid so dishonorable and so pernicious a consequence. It is evident, that the power of the Government to take away a vested right, was questionable in the minds of the American Commissioners, since they would not exercise that power in restoring confiscated real estate; and confiscated debts, or other personal estate, must come within the same rule,' &c.

The abstract of an argument like this of Marshall's, must necessarily give the reader an imperfect idea of its power. Nevertheless, he cannot fail to be impressed with the vigor, rigorous analysis, and close reasoning that mark every sentence of it. We have seen that it elicited great admiration at the time of its delivery, and enlarged the circle of his reputation. His practice, for several years before his final withdrawal from the Bar, was more extensive than that of any other lawyer in Virginia. The Duke de Liancourt, who was

in Richmond, in 1797, speaking of Edmund Randolph, the ex-Secretary of State, says that 'he has great practice, and stands, in that respect, nearly on a par with Mr. J. Marshall, the most esteemed and celebrated counsellor in this town. The profession of a lawyer is here, as in every other part of America, one of the most profitable. But, though the employment be here more constant than in Carolina, the practitioner's emoluments are very far from being equally considerable. Mr. Marshall does not, from his practice, derive above four or five thousand dollars *per annum*, and not even that sum every year.'[1]

'Mr. J. Marshall,' says the Duke, after a more familiar acquaintance with the public characters at the capital of Virginia, 'conspicuously eminent as a professor of the law, is, beyond all doubt, one of those who rank highest in the public opinion at Richmond. He is what is termed a Federalist, and perhaps, at times, somewhat warm in support of his opinions, but never exceeding the bounds of propriety, which a man of his goodness, and prudence, and knowledge, is incapable of transgressing. He may be considered as a distinguished character in the United States. His political enemies allow him to possess great talents, but accuse him of ambition. I know not whether the charge be well or ill-grounded, or whether that ambition might ever be able to impel him to a dereliction of his principles — a conduct of which I am inclined to disbelieve the possibility on his part. He has already refused several employments under the General Government, preferring the income derived from his professional labors (which is more than sufficient

[1] Travels, vol. ii., p. 38.

for his moderate system of economy), together with a life of tranquil ease in the midst of his family, and in his native town.[1] Even by his friends he is taxed with some little propensity to indolence; but, even if this reproach were well-founded, he, nevertheless, displays great superiority in his profession when he applies his mind to business.'[2]

We shall see, in the following chapters, that Marshall never sought office; that, in most instances, he accepted it with reluctance, and always returned to his profession with renewed interest, and a determination to pursue it with undivided attention. His ambition, if that sentiment held any place in his mind at all, sought its gratification in the triumphs of the Bar. Though warmly and earnestly attached to the political principles of the Federal party, he seems to have had a repugnance to a political career. His nature was not sufficiently eager and aspiring to seek or covet its honors. When he engaged in the public service, it was, for the most part, for some special purpose, and on some special occasion. In truth, the insinuation that selfish ambition influenced either his sentiments or conduct finds no support in any act of his life.

'Even by his friends he is taxed with some little propensity to indolence,' says the Duke de Liancourt; and his friends, we suspect, were not unjust to him. In truth, he was something of a truant. But such were the vigor and comprehension of his mind, that he could better afford, than most men, to indulge a fondness for social, and even convivial enjoyment.

[1] This is a mistake; Marshall being a native of Fauquier County.

[2] Travels, vol. ii., p 62

It was hardly possible for a lawyer of Marshall's conceded abilities, and great personal popularity, to keep aloof from public life during the eventful period in which he lived. Having, therefore, seen what success crowned his exertions at the Bar, we shall now proceed to trace his various services to the public, at home and abroad.

CHAPTER V.

1782–1788.

MEMBER OF THE VIRGINIA LEGISLATURE.

THE political career of John Marshall is prominently distinguished for his devotion to the Union of the States, and a government competent to maintain it. He early perceived the inadequacy of the Confederation, and the absolute necessity of a more comprehensive and vigorous central authority. He belonged, from the outset, to the party who would strengthen the General Government, and enable it to execute the powers with which it might be invested, independently of the several States. Virginia was the State of his birth, and the home of his affections; but the *United* States constituted his country — a country dearer and more comprehensive than the local limits within which he was born. His attachment to the Union was formed early, and fostered by the circumstances that attended his outset in life.

'When I recollect,' thus he wrote long after to a friend, 'the wild and enthusiastic notions with which my political opinions of that day were tinctured, I am disposed to ascribe my devotion to the Union, and to a government competent to its preservation, at least, as much to casual circumstances as to judgment. I had grown up at a time when the love of the Union,

and the resistance to the claims of Great Britain, were the inseparable inmates of the same bosom; when patriotism and a strong fellow-feeling with our suffering fellow-citizens of Boston were identical; when the maxim, "United we stand; divided we fall," was the maxim of every orthodox American. And I had imbibed these sentiments so thoroughly, that they constituted a part of my being. I carried them with me into the army, where I found myself associated with brave men from different States, who were risking life and everything valuable, in a common cause, believed by all to be most precious; and where I was in the habit of considering America as my country, and Congress as my government.'[1]

These sentiments were confirmed by the progress of events, and his experience in the Assembly of Virginia. He was elected a member of that body in the spring of 1782, and in the autumn a member of the Executive Council. He knew what hardships the army had endured; he had partaken their sufferings, and 'my immediate entrance into the State Legislature,' said he in the letter from which the preceding extract is taken, 'opened to my view the causes which had been chiefly instrumental in augmenting those sufferings; and the general tendency of State politics convinced me, that no safe and permanent remedy could be found, but in a more efficient and better organized General Government.'[2]

At this time, the Federal treasury was destitute of money, and the army without pay, provisions or clothing. The non-compliance of the States with the requisitions of Congress threatened the most disastrous con-

[1] Story's Discourse on the Life, &c., of John Marshall. [2] Ibid.

sequences. We have seen, in the Life of Rutledge, that that body sent a deputation to the Eastern and Southern States, to explain the condition of public affairs, and the danger to which the country was exposed by the delinquency of the several members of the Confederacy. Rutledge and Clymer, who were deputed to visit the Southern States, were permitted to make a personal address to the Virginia Assembly.[2] Of this Assembly Marshall was a member; and a steady advocate of all measures that tended to strengthen the Federal authority, and enable it to perform its obligations to the army, and the public creditors. His vindications of the claims of the army upon the country were constant and earnest, and awakened their gratitude. But so feeble was the Confederacy, and so languid and exhausted the States, that he clearly perceived the impossibility of reviving the public spirit, and restoring the public credit, without the establishment of a more vigorous and comprehensive system of government. This was the leading idea of his scheme of politics.

On the 3d of January, 1783, he was married to Mary Willis Ambler, a daughter of Jacqueline Ambler, then Treasurer of Virginia. He had become attached to this lady before he left the army; an attachment which continued with unabated fervor to the end of his days. She died several years before him; but he cherished her memory with unaffected tenderness, and in his will described her as a sainted spirit that had fled from the sufferings of life.

About the time of his marriage, he fixed his residence in Richmond. Desirous of devoting himself more closely to his profession, he resigned his seat in

[2] On the 14th of June, 1782.

the Executive Council. But he was not permitted thus to withdraw from public life. His old friends, neighbors, and former constituents of Fauquier County, immediately after his resignation, namely, in the spring of 1784, again elected him a member of the Assembly. Three years later, Henrico, his adopted county, paid him the same tribute of respect.

At the time of this last election, the affairs of the United States were fast sinking into utter disorder and confusion. Reflecting minds beheld the progress of events with the most gloomy forebodings. They saw that immediate and effectual reform alone could arrest the downward tendency of things. To accomplish that object they now earnestly addressed themselves. Shall the arm of the Federal Government be strengthened; shall it be invested with larger and more effectual powers over the commerce, the money, the foreign and mutual relations of the States; shall it have a revenue independent of them, and authority to carry into effect its measures without their instrumentality? These were the questions that now awakened and agitated the public mind. Marshall's judgment, reflection, and experience, alike concurred in giving them an affirmative answer. But in all the States, and particularly in Virginia, there was a party who were actuated by an extreme jealousy of national sovereignty. Although it was notorious that the Articles of Confederation had proved totally inadequate to all the purposes of a government, they insisted that, with some slight modifications, they conferred on the central authority all the power with which it was either prudent or safe to invest it. Rather than give it more, they would risk a dissolution of the Union; believing that a consolidated government was more

to be dreaded, than the possible separation of the States.[1]

Against notions like these, Marshall earnestly protested. He believed that the salvation of his country depended on the prevalence of more enlarged views, and more solid principles. In the Assembly, in popular meetings, he maintained the necessity of a more vigorous scheme of government, not only to preserve the Union, but to insure its benefits. The doctrines he now advocated formed the basis of his political creed through life. He adhered to them when they were in the ascendant, and after they had fallen into disfavor. From first to last, he was a Federalist.

> 'Among innumerable false, unmov'd,
> Unshaken, unseduc'd, unterrified;
> His loyalty he kept, his love, his zeal.'

He hailed the call of the Federal Convention as an auspicious event; and, without hesitation, vindicated the result of its labors.

[1] Judge Story has said that 'the question, whether the Union ought to be continued, or dissolved by a total separation of the States, was freely discussed,' in the halls of the Virginia Legislature; 'and either side of it was maintained, not only without reproach, but with an uncompromising fearlessness of consequences.' Discourse on Marshall, p. 25. In this the learned Judge is, probably, in error. There were in Virginia, as in every other State, enemies of the Union; but they were not to be found, we apprehend, among her public men. Many of these, indeed, protested against conferring on the General Government what they considered dangerous powers; but they professed great attachment to the Union of the States. Said George Mason in the Virginia Convention, 'I have never, in my whole life, heard one single man deny the necessity and propriety of the Union.' And Governor Randolph, on the same occasion, spoke of a dissolution of the Union, as that deplorable thing 'which no man yet has dared openly to advocate.'

'In the course of the session of 1788,' he says, 'the increasing efforts of the enemies of the Constitution made a deep impression; and before its close, a great majority showed a decided hostility to it. I took an active part in the debates on this question, and was uniform in support of the proposed Constitution.'

With these sentiments, he was elected a member of the Virginia Convention, and in the next chapter we shall see the part he took in its deliberations.

CHAPTER VI.

1788.

MEMBER OF THE VIRGINIA CONVENTION.

Personally, Marshall was the most popular of men. His serene and joyous temper, his kind and generous heart, his exemption from pride and affectation, his moderation, candor, and integrity, attracted and fixed the regards of men. Though party spirit might run high, and the principles he espoused be little in favor, he never failed, when a candidate, to secure his election. A conspicuous instance of this personal weight and influence was his election as a member of the Virginia Convention, which met to decide on the ratification of the Federal Constitution. The current of opinion had set strongly against that instrument throughout Virginia. A majority of the voters of Henrico County were supposed to be hostile to it. Nevertheless, Marshall, with his well-known opinions, came forward as a candidate for the Convention.

'The questions,' he said afterwards, 'which were perpetually recurring in the State Legislatures; and which brought annually into doubt principles which I thought most sacred; which proved, that everything was afloat, and that we had no safe anchorage ground; gave a high value, in my estimation, to that article in the Constitution which imposes restrictions on the

States. I was, consequently, a determined advocate for its adoption, and became a candidate for the Convention.'[1] His opinions constituted the only obstacle to his election; and the determined effort that was made, on that ground, to defeat him, signally failed. 'Parties,' as he subsequently said, 'had not yet become so bitter as to extinguish the private affections;' and he was elected by a considerable majority.

The Convention assembled at Richmond on the 2d day of June, 1788. It was composed of the best abilities of Virginia. The fame of the speakers, and the magnitude of the question that was to engage their powers, created a vast expectation.

'Industry deserted its pursuits, and even dissipation gave up its objects, for the superior enjoyments which were presented by the hall of the Convention. Not only the people of the town and neighborhood, but gentlemen from every quarter of the State, were seen thronging to the metropolis, and speeding their eager way to the building in which the Convention held its meetings. Day after day, from morning till night, the galleries of the house were continually filled with an anxious crowd, who forgot the inconvenience of their situation in the excess of their enjoyment; and far from giving any interruption to the course of the debate, increased its interest and solemnity by their silence and attention. No bustle, no motion, no sound, was heard among them, save only a slight movement, when some new speaker arose, whom they were all eager to see as well as to hear; or when some masterstroke of eloquence shot thrilling along their nerves, and extorted an involuntary and inarticulate murmur.

[1] Story's Discourse, p. 28.

Day after day was this banquet of the mind and of the heart spread before them, with a delicacy and variety which could never cloy.'[1]

Conspicuous among those who opposed the ratification of the Constitution were Patrick Henry, George Mason, and William Grayson; a combination of eloquence, vigor, and genius, not often surpassed, and seldom equalled. Foremost among those who supported it were James Madison and Edmund Randolph. On the same side were arrayed, among other distinguished names, the venerable Edmund Pendleton, who presided over the deliberations of the Convention; James Innis, the Attorney-General of Virginia, a gentleman of great eloquence, 'eloquence,' said Patrick Henry, 'splendid, magnificent, and sufficient to shake the human mind,' George and William Nicholas, and John Marshall.

The after-acquired renown of the latter gives a sort of retroactive interest to his efforts on this occasion; but, even disconnected with his subsequent career, they will be found to possess sufficient merit to foreshow great reputation as a debater. That perfect exemption from needless incumbrance of matter or ornament, which has been pointed out as characteristic of all his intellectual displays, and as the effect, in some degree, of an aversion to the labor of thinking, is equally evinced in the speeches we are about to lay before the reader. We could wish, at the same time, to give him an accurate idea of the speaker's manner in public debate. That manner was peculiar, but effective. In nothing, perhaps, did it emulate the unrivalled oratorical qualities of Patrick Henry. Indeed,

[1] Life of Patrick Henry, p. 293.

a greater contrast could hardly be conceived than between these two men. The one had passion, fire, impetuosity, and, as shown by these debates, vigorous conceptions and clear ideas. The other depended on reason alone, and yet, when in full career, held the attention of his audience with as firm a grasp as his more eloquent opponent. His exordium, however, was little calculated to create expectation, or awaken sympathy.

'So great a mind, perhaps, like large bodies in the physical world, is with difficulty set in motion. That this is the case with Mr. Marshall's is manifest, from his mode of entering on an argument, both in conversation and in public debate. It is difficult to rouse his faculties: he begins with reluctance, hesitation, and vacancy of eye: presently, his articulation becomes less broken, his eye more fixed, until, finally, his voice is full, clear, and rapid, his manner bold, and his whole face lighted up with the mingled fires of genius and passion: and he pours forth the unbroken stream of eloquence in a current deep, majestic, smooth, and strong. He reminds one of some great bird, which flounders and flounces on the earth for awhile, before it acquires *impetus* to sustain its soaring flight.'[1]

Marshall's first speech in the Convention was on the power of taxation; but as the debate had been discursive, he did not confine his attention exclusively to that topic, and replied to many of the objections

[1] 'Sketches and Essays of Public Characters,' by Francis W. Gilmer.

that had been urged against the Constitution as a whole.

'I conceive,' said he, 'that the object of the discussion now before us is, whether democracy or despotism be most eligible. I am sure that those who framed the system submitted to our investigation, and those who now support it, intend the establishment and security of the former. The supporters of the Constitution claim the title of being firm friends of the liberty and the rights of mankind. They say that they consider it as the best means of protecting liberty. We, Sir, idolize democracy. Those who oppose it have bestowed eulogiums on monarchy. We prefer this system to any monarchy, because we are convinced that it has a greater tendency to secure our liberty, and promote our happiness. We admire it, because we think it a well-regulated democracy. It is recommended to the good people of this country; they are, through us, to declare whether it be such a plan of government as will establish and secure their freedom.

'Permit me to attend to what the honorable gentleman [Patrick Henry] has said. He has expatiated on the necessity of a due attention to certain maxims; to certain fundamental principles, from which a free people ought never to depart. I concur with him in the propriety of the observance of such maxims. They are necessary in any government, but more essential to a democracy than to any other. What are the favorite maxims of democracy? A strict observance of justice and public faith, and a steady adherence to virtue. These, Sir, are the principles of a good government. No mischief, no misfortune, ought to deter us from a strict observance of justice and public faith. Would to Heaven that these principles had been ob-

served under the present government! Had this been the case, the friends of liberty would not be so willing now to part with it. Can we boast that our government is founded on these maxims? Can we pretend to the enjoyment of political freedom or security, when we are told that a man has been, by an Act of Assembly, struck out of existence without a trial by jury, without examination, without being confronted with his accusers and witnesses, without the benefits of the law of the land? Where is our safety, when we are told that this act was justifiable, because the person was not a Socrates? What has become of the worthy member's maxims? Is this one of them? Shall it be a maxim, that a man shall be deprived of his life without the benefit of law? Shall such a deprivation of life be justified by answering, that the man's life was not taken *secundum artem* because he was a bad man?[1] Shall it be a maxim, that government ought not to be empowered to protect virtue?'

[1] Marshall here refers to the case of Josiah Phillips, which had been adduced by Governor Randolph as an instance of gross departure from national principles, as well as a violation of the Constitution of Virginia. The facts of the case were thus stated by Randolph: — 'From mere reliance on general reports, a gentleman in the House of Delegates informed the House, that a certain man (Phillips) had committed several crimes, and was running at large, perpetrating other crimes. He, therefore, moved for leave to attaint him; he obtained that leave instantly; no sooner did he obtain it, than he drew from his pocket a bill ready written for that effect; it was read three times in one day, and carried to the Senate. I will not say that it passed the same day through the Senate; but he was attainted very speedily and precipitately, without any proof better than vague reports. Without being confronted with his accusers and witnesses, without the privilege of calling for evidence in his behalf, he was sentenced to death, and was afterwards actually executed. Was this arbitrary deprivation of life, the dearest gift of God to man, consistent with the genius of a republican government? Is this compatible with the

'He says, we wish to have a strong, energetic, powerful government. We contend for a well-regulated democracy. He insinuates that the power of the government has been enlarged by the Convention, and that we may apprehend it will be enlarged by others. The Convention did not, in fact, assume any power.

spirit of freedom? This, Sir, has made the deepest impression on my heart, and I cannot contemplate it without horror.' — *Elliott's Debates*, vol. iii., p. 66.

Patrick Henry thus replied: — 'The honorable gentleman has given you an elaborate account of what he judges tyrannical legislation, and an *ex post facto law*, in the case of Josiah Phillips. He has misrepresented the facts. That man was not executed by a tyrannical stroke of power. Nor was he a Socrates. He was a fugitive murderer, and an outlaw; a man who commanded an infamous banditti, and at a time when the war was at the most perilous stage. He committed the most cruel and shocking barbarities. He was an enemy to the human name. Those who declare war against the human race may be struck out of existence as soon as they are apprehended. He was not executed according to those beautiful legal ceremonies which are pointed out by the laws in criminal cases. The enormity of his crimes did not entitle him to it. I am truly a friend to legal forms and methods; but, Sir, in this case the occasion warranted the measure. A pirate, an outlaw, or a common enemy to all mankind, may be put to death at any time. It is justified by the laws of nature and nations.' — *Ibid.*, p. 140.

When this act of attainder passed, Henry was the Governor of Virginia, and Jefferson a member of the Assembly. Randolph, who had been hard pressed by Henry in debate, and arraigned for inconsistency in now supporting the Constitution, when, as a member of the Federal Convention, he had refused to sign it, brought forward the case of Phillips as a means of retaliation. But Jefferson says that Phillips was not executed under the act of attainder; that he was indicted at common law for either robbery or murder; was regularly tried, convicted, and executed. No use, he says, was ever made of the act of attainder. Governor Randolph acted for the Commonwealth in the prosecution; he being, at that time, Attorney-General. Jefferson supposes that there must have been some mistake in the report of Randolph's statement of the case in the Convention, as well as in Henry's reply.—*See Jefferson's Works*, vol. vi., pp 369, 440.

They have proposed to our consideration a scheme of government which they thought advisable. We are not bound to adopt it, if we disapprove of it. Had not every individual in this community a right to tender that scheme which he thought most conducive to the welfare of his country? Have not several gentlemen already demonstrated that the Convention did not exceed their powers? But the Congress have the power of making bad laws, it seems. The Senate, with the President, he informs us, may make a treaty which shall be disadvantageous to us; and that, if they be not good men, it will not be a good Constitution. I shall ask the worthy member only, if the people at large, and they alone, ought to make laws and treaties? Has any man this in contemplation? You cannot exercise the powers of government personally yourselves. You must trust to agents. If so, will you dispute giving them the power of acting for you, from an existing possibility that they may abuse it? As long as it is impossible for you to transact your business in person, if you repose no confidence in delegates, because there is a possibility of their abusing it, you can have no government; for the power of doing good is inseparable from that of doing some evil.'

'Let me pay attention to the observation of the gentleman who was last up [Mr. Monroe], that the power of taxation ought not to be given to Congress. This subject requires the undivided attention of this House. This power I think essentially necessary; for, without it, there will be no efficiency in the government. We have had a sufficient demonstration of the vanity of depending on requisitions. How, then, can the General Government exist without this power? The possibility of its being abused is urged as an argument against its expediency. To very little purpose did

Virginia discover the defects in the old system; to little purpose, indeed, did she propose improvements; and to no purpose is this plan constructed for the promotion of our happiness, if we refuse it now, because it is possible it may be abused. The Confederation has nominal powers, but no means to carry them into effect. If a system of government were devised by more than human intelligence, it would not be effectual if the means were not adequate to the power. All delegated powers are liable to be abused. Arguments drawn from this source go in direct opposition to the government, and in recommendation of anarchy. The friends of the Constitution are as tenacious of liberty as its enemies. They wish to give no power that will endanger it. They wish to give the government powers to secure and protect it. Our inquiry here must be, whether the power of taxation be necessary to perform the objects of the Constitution, and whether it be safe, and as well guarded as human wisdom can do it? What are the objects of the national government? To protect the United States, and to promote the general welfare. Protection, in time of war, is one of its principal objects. Until mankind shall cease to have ambition and avarice, wars will arise.'

'There must be men and money to protect us. How are armies to be raised? Must we not have money for that purpose? But the honorable gentleman says that we need not be afraid of war. Look at history, which has been so often quoted. Look at the great volume of human nature. They will foretell you that a defenceless country cannot be secure. The nature of man forbids us to conclude that we are in no danger from war. The passions of men stimulate them to avail themselves of the weakness of others. The Powers of Europe are jealous of us. It is our interest

to watch their conduct, and guard against them. They must be pleased with our disunion. If we invite them, by our weakness, to attack us, will they not do it? If we add debility to our present situation, a partition of America may take place. It is, then, necessary to give the government that power, in time of peace, which the necessity of war will render indispensable, or else we shall be attacked unprepared. The experience of the world, a knowledge of human nature, and our own particular experience, will confirm this truth. When danger shall come upon us, may we not do what we were on the point of doing once already; that is, appoint a dictator. . . . . We may now regulate and frame a plan that will enable us to repel attacks, and render a recurrence to dangerous expedients unnecessary. If we be prepared to defend ourselves, there will be little inducement to attack us. But, if we defer giving the necessary power to the General Government till the moment of danger arrives, we shall give it then, and with an *unsparing hand*.'

'I defy you to produce a single instance where requisitions on several individual States, composing a Confederacy, have been honestly complied with. Did gentlemen expect to see such punctuality complied with in America? If they did, our own experience shows the contrary.' 'A bare sense of duty, or a regard to propriety, is too feeble to induce men to comply with obligations. We deceive ourselves, if we expect any efficacy from these. If requisitions will not avail, the government must have the sinews of war some other way. Requisitions cannot be effectual. They will be productive of delay, and will ultimately be inefficient. By direct taxation, the necessities of the government will be supplied in a peaceable manner, without irritating the minds of the people. But

requisitions cannot be rendered efficient without a civil war; without great expense of money, and the blood of our citizens.'

'Is the system so organized as to make taxation dangerous? . . . I conceive its organization to be sufficiently satisfactory to the warmest friend of freedom. No tax can be laid without the consent of the House of Representatives. If there be no impropriety in the mode of electing the Representative, can any danger be apprehended? They are elected by those who can elect Representatives in the State Legislature. How can the votes of the electors be influenced? By nothing but the character and conduct of the men they vote for.' 'If they are to be chosen for their wisdom, virtue and integrity, what inducement have they to infringe on our freedom? We are told that they may abuse their power. Are there strong motives to prompt them to abuse it? Will not such abuse militate against their own interest? Will not they, and their friends, feel the effects of iniquitous measures? Does the Representative remain in office for life? Does he transmit his title of Representative to his son? Is he secured from the burden imposed on the community? To procure their re-election, it will be necessary for them to confer with the people at large, and convince them that the taxes laid are for their good. If I am able to judge on the subject, the power of taxation now before us is wisely conceded, and the Representatives wisely elected.'

'The extent of the country is urged as another objection, as being too great for a republican government. This objection has been handed from author to author, and has been certainly misunderstood and misapplied. To what does it owe its source? To observations and criticisms on governments, where repre-

sentation did not exist. As to the legislative power, was it ever supposed inadequate to any extent? Extent of country may render it difficult to execute the laws, but not to legislate. Extent of country does not extend the power. What will be sufficiently energetic and operative in a small territory, will be feeble when extended over a wide-extended country. The gentleman tells us there are no checks in this plan. What has become of his enthusiastic eulogium on the American spirit. We should find a check and control, when oppressed, from that source. In this country, there is no exclusive personal stock of interest. The interest of the community is blended and inseparably connected with that of the individual. When he promotes his own, he promotes that of the community. When we consult the common good, we consult our own. When he desires such checks as these, he will find them abundantly here. They are the best checks. What has become of his eulogium on the Virginia Constitution? Do the checks in this plan appear less excellent than those of the Constitution of Virginia? If the checks in the Constitution be compared to the checks in the Virginia Constitution, he will find the best security in the former.'

'The worthy member [Patrick Henry] has concluded his observations by many eulogiums on the British Constitution. It matters not to us whether it be a wise one or not. I think that, for America at least, the government on your table is very much superior to it. I ask you, if your House of Representatives would be better than it is, if a hundredth part of the people were to elect a majority of them, if your Senators were for life, would they be more agreeable to you? If your President were not accountable to you for his conduct — if it were a constitutional maxim,

that he could do no wrong—would you be safer than you are now? If you can answer, Yes, to these questions, then adopt the British Constitution. If not, then, good as that government may be, this is better.

'The worthy gentleman who was last up [Monroe], said the confederacies of ancient and modern times were not similar to ours, and that, consequently, reasons which applied against them could not be urged against it. Do they not hold out one lesson very useful to us? However unlike in other respects, they resemble it in its total inefficacy. They warn us to shun their calamities, and place in our government those necessary powers, the want of which destroyed them. I hope we shall avail ourselves of their misfortunes, without experiencing them. There was something peculiar in one observation he made. He said that those who governed the cantons of Switzerland were purchased by foreign powers, which was the cause of their uneasiness and trouble. How does this apply to us? If we adopt such a government as theirs, will it not be subject to the same inconvenience? Will not the same cause produce the same effect? What shall protect us from it? What is our security? He then proceeded to say, the causes of war are removed from us; that we are separated by the sea from the powers of Europe, and need not be alarmed. Sir, the sea makes them neighbors to us. Though an immense ocean divides us, we may speedily see them with us. What dangers may we not apprehend to our commerce? Does not our naval weakness invite an attack on our commerce? May not the Algerines seize our vessels? Cannot they, and every other predatory or maritime nation, pillage our ships, and destroy our commerce, without subjecting themselves to any inconvenience? He would, he said, give the General Gov-

ernment all necessary powers. If anything be necessary, it must be so to call forth the strength of the Union when we may be attacked, or when the general purposes of America require it. The worthy gentleman then proceeded to show, that our present exigencies are greater than they ever will be again. Who can penetrate into futurity? How can any man pretend to say that our future exigencies will be less than our present? The exigencies of nations have been generally commensurate to their resources. It would be the utmost impolicy to trust to a mere possibility of not being attacked, or obliged to exert the strength of the community.'

'He then told you that your continental government will call forth the virtue and talents of America. This being the case, will they encroach on the power of the State governments? Will our most virtuous and able citizens wantonly attempt to destroy the liberty of the people? Will the most virtuous act the most wickedly? I differ in opinion from the worthy gentleman. I think the virtue and talents of the members of the General Government will tend to the security, instead of the destruction, of our liberty. I think that the power of direct taxation is essential to the existence of the General Government, and that it is safe to grant it. If this power be not necessary, and as safe from abuse as any delegated power can possibly be, then, I say that the plan before you is unnecessary; for it imports not what system we have, unless it have the power of protecting us in time of peace and war.'

Marshall next addressed the Convention in support of that clause of the Constitution which gives Congress power to provide for arming, organizing, and disciplining the militia, and governing those in the actual

service of the Union. It had been attacked by Patrick Henry as a very alarming power. He declared that, as the clause expressly vested the General Government with power to call out the militia to suppress insurrections, &c., it appeared to him, most decidedly, that the power of suppressing insurrections was *exclusively* given to Congress. If it remained in the States, it was by implication.

Marshall asked, in reply, if gentlemen were serious when they asserted that, if the State governments had power to interfere with the militia, it was by implication. 'If they were, he asked the Committee whether the least attention would not show that they were mistaken. The State governments did not derive their powers from the General Government; but each government derived its powers from the people, and each was to act according to the powers given to it. Would any gentleman deny this? He demanded if powers not given were retained by implication. Could any man say so? Could any man say that this power was not retained by the States, as they had not given it away? For, says he, does not a power remain until it is given away? The State Legislatures had power to command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away.' 'The truth is, that when power is given to the General Legislature, if it was in the State Legislature before, both shall exercise it; unless there be an incompatibility in the exercise by one to that by the other, or negative words precluding the State governments from it. But there are no negative words here. It rests, therefore, with the States. To me it appears, then, unquestionable that the State governments can call forth the militia, in case the Constitution should be adopted, in the

same manner as they would have done before its adoption.

'When the government is drawn from the people, and depending on the people for its continuance, oppressive measures will not be attempted, as they will certainly draw on their authors the resentment of those on whom they depend. On this government, thus depending on ourselves for its existence, I will rest my safety, notwithstanding the danger depicted by the honorable gentleman. I cannot help being surprised that the worthy member thought this power so dangerous. What government is able to protect you in time of war? Will any State depend on its own exertions? The consequence of such dependence, and withholding this power from Congress, will be, that State will fall after State, and be a sacrifice to the want of power in the General Government. United we are strong, divided we fall. Will you prevent the General Government from drawing the militia of one State to another, when the consequence would be, that every State must depend on itself? The enemy, possessing the water, can quickly go from one State to another. No State will spare to another its militia, which it conceives necessary for itself. It requires a superintending power in order to call forth the resources of all to protect all. If this be not done, each State will fall a sacrifice. This system merits the highest applause in this respect. The honorable gentleman said that a general regulation may be made to inflict punishments. Does he imagine that a militia law is to be ingrafted on the scheme of government, so as to render it incapable of being changed? The idea of the worthy member supposes that men renounce their own interests. This would produce general inconveniences throughout the Union, and would be equally opposed

by all the States. But the worthy member fears, that in one part of the Union they will be regulated and disciplined, and in another neglected. This danger is enhanced by leaving this power to each State; for some States may attend to their militia, and others may neglect them. If Congress neglect our militia, we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into the hands of her militia men?'

The judicial power bestowed on the General Government by the Constitution, was denounced by the opponents of that instrument with great earnestness. It was said that its exercise might destroy the dearest rights of the community; that the effect and operation of the Federal Courts would go to the destruction of the State governments. To arguments like these, and of a similar strain, Marshall thus replied: —

'Mr. Chairman, this part of the plan before us is a great improvement on that instrument from which we are now departing. Here are tribunals appointed for the decision of controversies, which were before either not at all, or improperly, provided for. That many benefits will result from this to the members of the collective society, every one confesses. Unless its organization be defective, and so constructed as to injure, instead of accommodating, the convenience of the people, it merits our approbation. After such a candid and fair discussion by those gentlemen who support it — after the very able manner in which they have investigated and examined it — I conceived it would be no longer considered as so very defective, and that those who opposed it would be convinced of the impropriety of some of their objections. But I perceive that they

still continue the same opposition. Gentlemen have gone on an idea that the Federal Courts will not determine the causes which may come before them, with the same fairness and impartiality with which other Courts decide. What are the reasons of this supposition? Do they draw them from the manner in which the judges are chosen, or the tenure of their office? What is it that makes us trust our judges? Their independence in office, and manner of appointment. Are not the judges of the Federal Court chosen with as much wisdom as the judges of the State governments? Are they not equally, if not more independent? If so, shall we not conclude that they will decide with equal impartiality and candor? If there be as much wisdom and knowledge in the United States as in a particular State, shall we conclude that that wisdom and knowledge will not be equally exercised in the selection of judges?'

'With respect to its cognizance [the cognizance of the Federal judiciary] in all cases arising under the Constitution and the laws of the United States, he [George Mason] says that the laws of the United States being paramount to the laws of the particular State, there is no case, but what this will extend to. Has the Government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same State? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.'

'How disgraceful is it, that the State Courts cannot be trusted, says the honorable gentleman. What is the language of the Constitution? Does it take away their jurisdiction? Is it not necessary that the Federal Courts should have cognizance of cases arising under the Constitution and the laws of the United States? What is the service or purpose of a judiciary, but to execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here?'

'With respect to disputes between a State, and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the Federal Court.[1] Is there no such case at present? Are there not many cases in which the Legislature of Virginia is a party, and yet the State is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable States to recover claims of individuals residing in other States. I contend that this construction is warranted by the words; but, say they, there will be partiality in it, if a State cannot be defendant — if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that

[1] This, however, was actually done in the case of Chisholm *v.* Georgia. The decision of the Court in that case led to an amendment of the Constitution, forbidding such an exercise of authority.

account? If an individual has a just claim against any particular State, is it to be presumed that, on application, he will not obtain satisfaction? But how could a State recover any claim from a citizen of another State, without the establishment of these tribunals?

'The honorable member objects to suits being instituted in the Federal Courts, by the citizens of one State, against the citizens of another State. Were I to contend that this was necessary in all cases, and that the government, without it, would be defective, I should not use my own judgment. But are not the objections to it carried too far? Though it may not, in general, be absolutely necessary, a case may happen, as has been observed, in which a citizen of one State ought to be able to recur to this tribunal, to recover a claim from the citizen of another State. What is the evil which this can produce? Will he get more than justice there? The independence of the judges forbids it. What has he to get? Justice. Shall we object to this, because the citizen of another State can obtain justice without applying to our State Courts? It may be necessary, with respect to the laws and regulations of commerce, which Congress may make. It may be necessary in cases of debt, and some other controversies. In claims for land, it is not necessary, but it is not dangerous. In the Court of which State will it be instituted? said the honorable gentleman. It will be instituted in the Court of the State where the defendant resides, where the law can come at him, and no where else. By the laws of which State will it be determined? said he. By the laws of the State where the contract was made. According to those laws, and those only, can it be decided. Is this a novelty? No; it is a principle in the jurisprudence

of this Commonwealth. If a man contracted a debt in the East Indies, and it was sued for here, the decision must be consonant to the laws of that country.'

Such was the line of argument adopted by Marshall in support of the Federal Constitution. His speeches were evidently not premeditated; but made on the spur of the occasion, and in reply to objections brought forward by his opponents. If not as comprehensive in their scope as the speeches of Madison, they were, nevertheless, vigorous, pointed, and adapted to the end he had in view. They were, chiefly, in answer to the arguments of Patrick Henry and George Mason. How they were estimated by the former may be inferred from his brief, but generous eulogium. 'I have,' said he, 'the highest veneration and respect for the honorable gentleman, and I have experienced his candor on all occasions.'

After an earnest debate of twenty-five days, a debate illustrated by an extraordinary display of eloquence and ability, the Convention accepted the Constitution by a majority of ten votes. The result, it has been thought, would have been different, had not the news arrived, while the Convention was yet in session, that nine States had already given their voice in its favor, and thus insured its success.

The Constitution adopted, we shall see, in the following chapters, that Marshall gave an earnest support to the government organized in accordance with its provisions, and to the principles on which that government was conducted by the Administrations of Washington and Adams.

CHAPTER VII.

1788–1797.

MEMBER OF THE VIRGINIA LEGISLATURE.

The high professional reputation to which Marshall had attained, seemed naturally to invite an exclusive devotion of his talents to the labors of the Bar. A narrow fortune and growing family were impelling motives to that line of conduct. Accordingly, he now determined to relinquish public life, and adhere, for the future, to his profession. But the opposition the Constitution had already encountered in Virginia, and the hostility that still existed against that instrument, indicated that the government which was now to be organized in pursuance of its provisions, would be likely to meet with very lukewarm support from the State Legislature, if the anti-Federalists should secure an ascendency in that body. It was, therefore, the obvious policy of the Federalists to effect, if possible, a different result; under such circumstances Marshall was prevailed upon to forego his determination to quit public life, and become a candidate for the Legislature.

He was elected, and continued to serve in that body until the spring of 1791. The anti-Federalists, however, had the majority, and sent to the Senate of the United States, William Grayson and Richard Henry Lee, who had opposed the Constitution, in preference

to Madison and Pendleton, who had supported it. All the leading measures of the Administration were freely criticised and discussed in the Virginia Legislature, and their tendency regarded with a jealous watchfulness.

Marshall, who had the greatest confidence in the wisdom of Washington, and naturally inclined to favor a line of policy that would impart vigor and efficiency to the new system, supported with all his powers those measures which most excited the animadversion, and aroused the hostility, of the party who had originally opposed the Constitution as fraught with danger to liberty, and now thought they perceived, in the action of the government, the approaching realization of their fears. The funding system, the assumption of the State debts, and the creation of a national bank, were regarded as violative of the powers conferred on the General Government, and leading directly to consolidation. These grave questions were reviewed, criticised, and discussed in the halls of the Virginia Legislature, with abilities equal to the topics, and the occasion. Marshall participated in these debates, and asserted the constitutionality as well as the policy of the measures thus assailed; but the current was too strong to be resisted. The predominant party in Virginia were opposed to nearly every important measure of Washington's Administration, and took no pains to conceal their disapprobation and disgust.

In 1792, Marshall declined a re-election, and for the next three years was immersed in the business of his profession. He was engaged, on one side or the other, in nearly all the important causes in the State and Federal Courts. These were, probably, the most active years of his professional life. But, extensive as were his engagements at the Bar, it was impossible for

a man of his abilities, and avowed opinions, in the stirring times in which he lived, to withdraw himself entirely from politics. Assailed as was the domestic policy of the government, its foreign policy was even more fiercely denounced. The President's celebrated Proclamation of Neutrality inflamed the elements of discontent, stimulated the zeal, and increased the strength of the opposition. On this occasion, Marshall came forward in support of the President's course, and at a meeting of the citizens of Richmond obtained a considerable majority in favor of resolutions approving it. But he paid the usual penalty, rigorously inflicted upon all who, with whatever purity of motive, actively participate in political discussions; he was assailed by the opposite party with great bitterness. Bold reproaches and witty malice were studiously employed to weaken his influence, and detract from the merit of his arguments. He was denounced as an advocate of aristocratic principles; as a loyalist and an enemy of republicanism. But these attacks failed of their aim. In Richmond, where his character, political sentiments, and manner of life were well understood, the assaults upon him proved perfectly harmless.

In 1795, he was again elected a member of the State Legislature; but against his wishes, and without his consent. The circumstances, however, seemed to justify this step. It was doubtful, so nearly equally were parties divided, whether the regular candidate of the Federalists, an intimate personal friend of Marshall's, could be elected. Accordingly, a poll was opened for Marshall, while he was engaged in one of the Courts, (notwithstanding he had declined being a candidate, and declared that his feelings and honor were engaged

for his friend,) and he was again returned as a member of the Legislature.

The Jay treaty, as we have elsewhere seen, had, at this time, created throughout the country an unparalelled ferment and excitement. In Virginia, it was attacked with unsparing zeal and bitterness. At a meeting of the citizens of Richmond, at which the venerable Chancellor Wythe presided, resolutions were adopted, denouncing it 'as insulting to the dignity, injurious to the interest, dangerous to the security, and repugnant to the Constitution of the United States.' At a subsequent meeting of the same citizens, Marshall introduced resolutions of a contrary tenor, and supported them in a speech of great power. His resolutions were adopted; but, marked as was his success on this occasion, it was in the Legislature that he received the most gratifying proofs of the vigor and effect of his arguments. There, both the expediency and constitutionality of the treaty were warmly denied. Inasmuch as the power to regulate commerce was bestowed on Congress, it was maintained, with great confidence, that the Executive had no constitutional right to negotiate a commercial treaty. Marshall's reply to this position has been considered as one of the most memorable displays of his genius. His speech, however, was not reported; but the traditional account is, that, for cogency of reasoning, and comprehensive knowledge of the whole subject matter of the debate, it was altogether admirable. He demonstrated so clearly the competency of the Executive to make the treaty, that all objection to it on constitutional grounds was abandoned. And even the resolution of the House approving the conduct of the Vir-

ginia Senators in voting against the treaty, expressed confidence in the patriotism and wisdom of the President, and declared that it was not intended to censure his motives in ratifying it. The fame of this great argument of Marshall's extended beyond the limits of Virginia. It made his name familiar throughout the country. When he visited Philadelphia a few months after, to argue the British debt case,[1] he was an object of marked attention.

'I then became acquainted,' he says, in a letter to a friend, 'with Mr. Cabot, Mr. Ames, Mr. Dexter, and Mr. Sedgwick of Massachusetts, Mr. Wadsworth of Connecticut, and Mr. King of New York. I was delighted with these gentlemen. The particular subject [the British treaty] which introduced me to their notice, was at that time so interesting, and a Virginian, who supported, with any sort of reputation, the measures of the Government, was such a *rara avis*, that I was received by them all with a degree of kindness, which I had not anticipated. I was particularly intimate with Mr. Ames, and could scarcely gain credit with him, when I assured him that the appropriations would be seriously opposed in Congress.'[2]

The death of Mr. Bradford, the Attorney-General, in the summer of 1795, gave Washington an opportunity to mark his appreciation of the character and abilities of Marshall, by tendering him the vacant post.

[1] Ante, p. 32.

[2] Story's Discourse, p. 40. See Marshall's Letter to Hamilton, of April 25th, 1796, (Hamilton's Works, vol. vi.,) giving an account of a public meeting in Richmond, at which a resolution was carried declaring the validity of the treaty, and its binding effect on Congress

'The salary annexed thereto,' said the President's letter, 'and the prospect of a lucrative practice in this city [Philadelphia], the present seat of the General Government, must be as well known to you, better, perhaps, than they are to me, and, therefore, I shall say nothing concerning them.'[1] This offer he declined upon the ground that it would interfere with his engagements at the Bar in Virginia.

In the following summer, Washington again called upon Marshall to enter the public service, as successor of Monroe at Paris; but he declined, on the ground that the crisis of his affairs rendered it impossible for him to leave the United States. 'Otherwise,' he added, 'such is my conviction of the importance of that duty which you would confide to me, and, pardon me if I add, of the fidelity with which I should attempt to perform it, that I would certainly forego any consideration not decisive with respect to future fortunes, and would surmount that just diffidence I have ever entertained of myself, to make an effort to convey truly and faithfully to the Government of France those sentiments which I have ever believed to be entertained by that of the United States.'[2] At this time, he thought his determination to remain at the Bar unalterable. 'My situation at the Bar,' said he, 'appeared to me to be more independent, and not less honorable, than any other; and my preference for it was decided.'[3] In the next chapter, we shall see the occasion that induced him to change his determination, and first engaged him in the service of the General Government.

In the meantime he continued a member of the Virginia Legislature; but rarely participated in the de-

[1] Washington's Writings, vol. xi., p. 62. August 25th, 1796.

[2] Ibid., p. 143. July 11th, 1796.

[3] Story's Discourse, p. 41.

bates, except to vindicate the measures of the Federal Administration. One of these debates he has thus described: — 'It was, I think,' says the Chief Justice, 'in the session of 1796, that I was engaged in a debate, which called forth all the strength and violence of party. Some Federalist moved a resolution, expressing the high confidence of the House in the virtue, patriotism, and wisdom of the President of the United States. A motion was made to strike out the word *wisdom*. In the debate the whole course of the Administration was reviewed, and the whole talent of each party was brought into action. Will it be believed, that the word was retained by a very small majority? A very small majority of the Legislature of Virginia acknowledged the wisdom of General Washington!'[1]

In the next chapter we shall view the course of Marshall and his colleagues in their endeavors to adjust the difficulties with France, and witness the admirable temper which marked his conduct throughout his disagreeable stay at Paris.

[1] Story's Discourse, p. 41.

CHAPTER VIII.

1797—1798.

ENVOY EXTRAORDINARY TO FRANCE.

We have seen, in the preceding chapter, that when Monroe was recalled from France, for causes which we have elsewhere explained, the vacant post was offered to Marshall. When he declined it, the appointment was conferred on Charles Cotesworth Pinckney. The result of his mission we have already seen; the French Government not only refused to receive him, but finally ordered him to leave the country. He then proceeded to Amsterdam, and awaited instructions from home. In this conjuncture, the Administration determined to send out an Extraordinary Commission to renew negotiations with France, and thus, if possible, avoid the alternative of war. Accordingly, on the 31st of May, 1797, President Adams nominated, as Envoys Extraordinary to that country, Charles Cotesworth Pinckney, John Marshall, and Francis Dana. The latter declining the appointment, it was conferred on Elbridge Gerry.

Marshall accepted the post which was thus assigned him with reluctance; but the occasion was so interesting, and the exigency so great, that he did not feel at liberty to decline it. He arranged his affairs at home

with all convenient despatch, and by July was ready to embark for Europe. On his departure from Richmond, he was attended, for several miles, by a large cavalcade of his fellow-citizens, who, on this, as on all occasions, invariably evinced the greatest attachment to his person, and respect for his character. However assailed he might be by political opponents, and however his political sentiments might be questioned, that attachment and respect were never wanting.

He embarked at Philadelphia for Amsterdam, in the ship Grace, Captain Willis, on the 17th of July, 1797. On the same day, the President, in a letter to Gerry, thus describes him: — 'He is a plain man, very sensible, cautious, guarded, and learned in the law of nations. I think you will be pleased with him.'[1]

Naturally, very great solicitude was felt as to the reception that awaited him and his colleagues at Paris; and that solicitude was increased by the long interval which elapsed before any communication was received from them. Owing to the delays incident to a winter's voyage, their first official letter did not reach the Secretary of State until the 4th of March, 1798. That letter dissipated all hope that they would be officially recognized, or the objects of their mission be accomplished.

This mission constitutes a curious chapter in the history of diplomacy, and the circumstances that marked its progress and result are full of interest.

The Envoys arrived at Paris on the evening of October 4th, 1797. The next day, verbally and unofficially, they informed M. Talleyrand, the Minister of Foreign Affairs, of their arrival, and desired to know when he would be at leisure to receive one of their

[1] Adams' Works, vol. viii., p. 549.

Secretaries with the official notification. He appointed the next day at two o'clock; when their letter of credence was duly presented to him. On the 8th, they waited upon him at his house, where he kept his office. He informed them that the Directory had required him to make a report relative to the situation of the United States with regard to France, which he was then about, and which would be furnished in a few days, when he would let them know what steps were to follow. They asked if cards of hospitality were, in the meantime, necessary. He said they were, and should be delivered to them. The next day they were sent, and in a style suitable to their official character.

Thus far appearances indicated that they would be received, and the negotiation proceed; but on the 14th, Major Mountflorence, Chancellor of the American Consulate at Paris, informed General Pinckney that he had had a conversation with Talleyrand's private and confidential Secretary, who told him that the Directory were greatly exasperated at some parts of the President's speech at the opening of the late session of Congress, and would require an explanation of them from the American Ministers. In another conversation, the Secretary informed Mountflorence that M. Talleyrand had told him that it was probable they would not have a public audience of the Directory till their negotiation was finished; that, in the meantime, persons might be appointed to treat with them, but they would report to Talleyrand, who would have the direction of the negotiation.

On the 18th, M. Hottinguer, who had been described to General Pinckney, as a gentleman of considerable credit and reputation, called on the General, and informed him that he had a message from M. Tal-

leyrand to communicate; that he was sure M. Talleyrand had a great regard for America and its citizens; and was very desirous that there should be a reconciliation between the two countries. To accomplish this, he was ready, if it was thought proper, to suggest a plan, confidentially, which M. Talleyrand expected would answer the purpose. General Pinckney said he should be glad to hear it. M. Hottinguer replied, that the Directory, and particularly two of them, were exceedingly irritated at some passages of the President's speech, and desired that they should be softtened; that this step would be necessary previous to their reception; and besides this, a sum of money was required for the pocket of the Directory, which would be at the disposal of M. Talleyrand, and that a loan would also be insisted on. M. Hottinguer said, these measures acceded to, M. Talleyrand had no doubt that the differences with France might be accommodated. The particular passages of the President's speech that had given offence he could not point out, nor the quantum of the loan, but the *douceur* for the Directory, he said, was twelve hundred thousand livres, about £50,000 sterling.

General Pinckney told him, that he and his colleagues, from their arrival in Paris, had been treated with great slight and disrespect; that they wished for peace with France, and had been entrusted with great powers to accomplish it, on honorable terms; but with regard to the propositions communicated by M. Hottinguer, he would not consider them before he had disclosed them to his colleagues; that having done so, M. Hottinguer should hear from him.

On communicating to his colleagues the purport of M. Hottinguer's visit, it was agreed, that General Pinckney should request him to make his propositions

to them all, and, to avoid mistakes or misapprehension, reduce the heads of them to writing. Accordingly, on the next day, General Pinckney called on M. Hottinguer, who consented to see the Envoys in the evening. He came at the appointed time, and left with them a set of propositions in writing. He had informed General Pinckney, however, that his communication was not directly with M. Talleyrand, but through another gentleman, in whom M. Talleyrand had great confidence. This afterwards proved to be M. Bellamy, of Hamburg.

On the morning of the 20th, M. Hottinguer called, and informed the Envoys, that M. Bellamy, the confidential friend of M. Talleyrand, would see them himself, and make the necessary explanations. He came in the evening, and was received in General Marshall's room. He mentioned the favorable impressions of M. Talleyrand towards the United States, impressions which were made by the kindness and civilities he had personally received while there; and that he was solicitous to repay those kindnesses, and was willing to aid the Envoys in their negotiatiation by his good offices with the Directory, who were extremely irritated on account of passages in the President's speech, and who had neither acknowledged nor received them, and, consequently, had not authorized M. Talleyrand to have any communications with them. In consequence, he could not see them himself, but had authorized M. Bellamy to communicate to them certain propositions, and receive their answers. But, in the same breath, as it were, he declared that he was no diplomatic character, was clothed with no authority, and was merely the friend of M. Talleyrand, and trusted by him. He then pointed out the objectionable passages of the President's speech, and made a series of

propositions as the basis of the negotiation. These propositions referred to certain disavowals and reparations which were to be preliminary to a treaty. The treaty itself was to place France, with respect to the United States, on the same footing as they stood with England in consequence of the Jay Treaty. It was also to contain a secret article stipulating a loan to France.

M. Bellamy dilated very much on the keenness of the resentment the President's speech had produced, and expatiated largely on the satisfaction indispensably necessary as a preliminary to negotiation. 'But,' said he, 'gentlemen, I will not disguise from you, that this satisfaction being made, the essential part of the treaty remains to be adjusted. *Il faut de l'argent—il faut beaucoup d'argent;* you must pay money, you must pay a great deal of money.' The next morning M. Bellamy and M. Hottinguer breakfasted with the Envoys at Mr. Gerry's. The former did not come until ten o'clock, having passed the morning with M. Talleyrand. He represented that both M. Talleyrand and himself were extremely sensible of the pain the Envoys must feel in disavowing the obnoxious passages of the President's speech; but that they must consider such disavowal as an indispensable preliminary to their reception, unless they could find means to change the determination of the Directory. He said he was not authorised to suggest those means; but, as a private individual, he would express the opinion that, with money, they would be able to succeed. He stated the sum which he believed would be satisfactory, and an eligible mode of giving it. There were, he said, thirty-two millions of Dutch rescriptions, worth ten shillings in the pound, which might be assigned to the United States at twenty shillings in the pound. In

the end they would lose nothing, for, after a peace, the Dutch Government would certainly repay them the amount. Hence, he said, the only operation of the measure would be an advance to France of thirty-two millions, on the credit of the Government of Holland. When asked if the *douceur* to the Directory must be in addition to this sum, he answered in the affirmative.

The Envoys told him that their powers were ample to negotiate a treaty; but the proposition of a loan in any form exceeded the limits of their instructions. That one of their number would return to the United States in order to consult the Government respecting it, provided the Directory would suspend further captures of American vessels, and proceedings on those already captured, &c. At this offer M. Bellamy was evidently disappointed. He said they treated the proposition of a loan as if it came from the Directory, whereas it did not proceed from them, nor even from M. Talleyrand, but was only a suggestion from himself, as a substitute to be proposed by the Envoys, in lieu of the painful disavowal that the Directory had determined to demand of them. They replied that they understood the matter perfectly; that the proposition in form was to come from them, but, substantially, it proceeded from the Minister. M. Bellamy expressed himself vehemently on the resentment of France; complained that the Envoys, instead of proposing a substitute for the reparations demanded of them, were stipulating conditions to be performed by the Directory itself; that he could not take charge of their offers, and that the Directory would persist in demanding a disavowal of the offensive passages of the President's speech. They replied, that they could not help it; that the Directory must determine what the

honor and interests of France required them to do; but for themselves they must guard the honor and interests of the United States. That the idea of disavowing the President's speech could not be treated by them in a serious light; that an attempt to do it would merely make them ridiculous to the Government and people they represented. M. Bellamy said, they certainly would not be received, and seemed to shudder at the consequences.

About the 27th of October, news reached Paris that the definitive articles of peace between France and Austria had been signed, and on that day the Envoys received another visit from M. Hottinguer. He said some proposals had been expected from them; that the Directory were becoming impatient, and would take a decided course towards America, unless they could be softened. He spoke of the different position France occupied in consequence of the peace, as warranting the expectation of a change in the system of the Envoys. They replied that that position they had anticipated, and it would not in any degree affect their conduct. He urged that, since the peace, the Directory had taken a higher and more decided tone with respect to the United States and all other neutral nations than ever before, and were determined that all nations should aid them or be treated as enemies. They answered, that they had anticipated as much when they refused the propositions that had been made to them. M. Hottinguer, after expatiating on the power and violence of France, returned once more to the subject of money. Said he, 'Gentlemen, you do not speak to the point; it is money. It is expected that you will offer money.' They said they had already given a very explicit answer to that point. 'No,' said he, 'you have not. What is your answer?' They

replied, '*It is no; no; not a sixpence.*' The conversation continued for nearly two hours; and the public and private advance of money was pressed and repressed in a variety of forms. M. Hottinguer then said he would communicate, as nearly as he could, the substance of what had passed, either to the Minister, or to M. Bellamy, who would make the communication.

Thus far the Envoys had no proof whatever that M. Hottinguer and M. Bellamy were acting by direction of M. Talleyrand, except their own assertions to that effect, the nature of their propositions, and the respectability of their characters. These left no doubt on their minds that they were authorised to confer with them. With M. Talleyrand himself they had held no direct communication, and had seen him but once, and that only on a formal occasion, and for a few moments. We shall now see that M. Talleyrand directly committed himself, and furnished conclusive evidence that the propositions and suggestions, which had been made to the Envoys, proceeded directly from himself.

On the 22d of October, M. Hautval, a French gentleman of respectable character, informed Mr. Gerry that M. Talleyrand had expected to have seen the American Ministers frequently in their private capacities, and to have conferred with them individually on the objects of their mission; and had authorised him to make this communication to Mr. Gerry. The latter sent for his colleagues, and a conference was held with M. Hautval on the subject. Pinckney and Marshall said, as they were not acquainted with M. Talleyrand, they could not, with propriety, call on him; but, according to the custom of France, he might expect this of Gerry from a previous acquaintance in the

United States. The next day Gerry, with great reluctance, however, called on M. Talleyrand, in company with M. Hautval; but the Minister not being at his office, appointed the 28th for the interview. On that occasion, after the first introduction, M. Talleyrand began the conference. He said the Directory had passed an arrête, in which they demanded of the Envoys an explanation of some parts of the President's speech at the opening of the extra session of Congress, and a reparation for other parts. He said he was sensible that difficulties would exist on the part of the Envoys relative to this demand; but on their offering money he thought he could prevent the effect of the arrête. Mr. Gerry requested M. Hautval to inform the Minister that the Envoys had no power to offer money. In that case, replied M. Talleyrand, they can take a power on themselves; and proposed that they should make a loan. Mr. Gerry, in answer to the observations of M. Talleyrand, said, that the uneasiness of the Directory respecting the President's speech was unconnected with the object of the mission; that they had no instructions with regard to it, and no powers whatever to make a loan. If it was deemed expedient, however, one of their number could return for instructions on that point, provided the other objects of the negotiation could be discussed and adjusted. Mr. Gerry then expressed his wish that M. Talleyrand would confer with his colleagues. M. Talleyrand, in answer, said, he should be glad to confer with the other Envoys individually, *but that this matter about the money must be settled directly, without sending to America;* that he would not communicate the arrête for a week; and that, if they could adjust the difficulty respecting the speech, an application would, nevertheless, go to the United States for a loan.

The reader will not fail to observe the complete correspondence between M. Talleyrand's propositions to Mr. Gerry, and the propositions made by M. Hottinguer and M. Bellamy. The money which M. Talleyrand said must be settled directly, referred to the *douceur* of £50,000, and he knew full well that the credit of the Envoys could command it. Indeed, a mercantile house, one of whose members introduced M. Hottinguer to General Pinckney, had offered to answer their draughts; a circumstance, doubtless, well known to M. Talleyrand.

Another visit from M. Hottinguer and M. Bellamy succeeded Mr. Gerry's interview with Talleyrand. The same propositions that had hitherto formed the burden of their communications, were substantially repeated, and enforced by high and threatening language. If the offers of Talleyrand were rejected, and war ensued, the fate of Venice might befall the United States, &c. 'Perhaps,' said M. Bellamy, 'you believe that, in returning, and exposing to your countrymen the unreasonableness of the demands of this Government, you will unite them in their resistance to those demands. You are mistaken. You ought to know that the diplomatic skill of France, and the means she possesses in your country, are sufficient to enable her, with the French party in America, to throw the blame which will attend the rupture of the negotiations on the Federalists, as you term yourselves, but on the British party, as France terms you; and you may assure yourselves this will be done.'

Such was the haughty style adopted by these unofficial agents, and it produced its natural result. The Envoys now determined to hold no more indirect intercourse with the French Government; and nothing but an anxious solicitude to preserve peace with

France induced them to remain longer at Paris, unreceived as they were, and treated with personal neglect and contempt. They informed the agents of M. Talleyrand that they would receive no more propositions from persons without acknowledged authority to treat with them; but, notwithstanding this, frequent and urgent attempts were made to inveigle them into an unofficial negotiation.

Beaumarchais, through John A. Chevallie, his agent at Richmond, had employed Marshall as his advocate in a suit against the State of Virginia for military stores, &c., furnished during the Revolution. Very naturally, Beaumarchais invited Marshall and his colleagues to dine with him, and they reciprocated the attention. Beaumarchais was an intriguer, almost by profession, and an exceedingly clever one. The sort of intimacy existing between him and the Envoys was a source of hope to M. Bellamy. M. de Beaumarchais entered into his views at once. He had obtained a judgment for one hundred and forty-five thousand pounds sterling in his suit against Virginia; but from this judgment an appeal was pending, and the final result was very uncertain.

On the 17th of December, M. Bellamy informed Marshall that Beaumarchais had consented, provided his claim could be established, to sacrifice £50,000 sterling of it, as the private gratification which had been required of the Envoys, so that the payment of that sum would not be any actual loss to the American Government. But the Envoys considered this proposition as a renewal of the old system of indirect, unauthorized negotiation, and would not entertain it.

'Having been originally the counsel of M. de Beaumarchais,' says Marshall, 'I had determined, and so I

had informed General Pinckney, that I would not, by my voice, establish any agreement in his favor; but that I would positively oppose any admission of the claim of any French citizen, if not accompanied with the admission of the claims of the American citizens for property captured and condemned for want of a *rôle d'equipage*.'

On the 17th of December, Mr. Gerry accompanied M. Bellamy on a visit to Talleyrand, who received them politely. Mr. Gerry observed to him, that M. Bellamy had stated to him that morning some propositions as coming from M. Talleyrand (referring to the gratuity of £50,000 sterling, and the purchase of the Dutch rescriptions, as the means of restoring friendship between the two countries), respecting which he could give no opinion. M. Talleyrand said the information M. Bellamy had given him was just, and might always be relied on; but that he would reduce to writing his propositions, which he did, and after showing them to Mr. Gerry, he burnt the paper. His propositions related to the purchase of the Dutch rescriptions; but M. Talleyrand, on this occasion, did not mention the gratuity. That he left to the management of his agents.

In this stage of the business, the Envoys came to the determination to prepare a letter to M. Talleyrand, stating the object of their mission, and discussing the subjects of difference between the two nations, in the same manner as if they had actually been received; and to close the letter with requesting the Government to open the negotiation with them, or grant them their

[1] Marshall's Journal. Wait's American State Papers, vol. iii., p. 214. We should observe that the despatches of the Envoys detailing the history of their mission were prepared, for the most part, by Marshall; and from them the narrative in the text is chiefly derived.

passports. This letter was prepared by Marshall, and has always been regarded as one of the most admirable of our State papers. For clearness of statement, cogency of argument, and dignified moderation, it deserves unqualified praise.[1] Talleyrand, in his reply of the 18th of March, complained that it reversed the known order of facts, 'so that it would appear,' he said, 'from that exposition, as partial as unfaithful, that the French Republic has no real grievance to substantiate, no legitimate reparation to demand, whilst the United States should alone have a right to complain, should alone be entitled to claim satisfaction.' This testimony to the ability with which the vindication of the United States was conducted, was rather enhanced by the failure of Talleyrand to substantiate the demerits which he attributed to it. Indeed, if the United States had the right, consistently with their treaty of alliance with France, to observe a fair and honest neutrality, and that right, said Marshall, 'is not recollected ever to have been questioned, and is believed not to admit of doubt,' then all the general charges of an unfriendly disposition, made against them by M. Talleyrand, really amounted to nothing, because the facts which he adduced to support them grew inevitably out of that situation.

On the 18th of January, 1798, the French Government passed a decree subjecting to capture all neutral vessels laden in part or whole with the manufactures or productions of England or its possessions. This decree convinced the Envoys that it was entirely impracticable to effect the objects of their mission. They determined, therefore, to write Talleyrand another let-

[1] See this letter in Wait's State Papers, vol. iii., p. 219. We regret that our space forbids us to make extracts from it. It was dated January 17th, 1798.

ter, state their objections to the decree, and announce their purpose to return to the United States. This letter was prepared, but, before sending it, and demanding their passports, they deemed it expedient to know of Talleyrand if he had any reply to make to their previous letter, which thus far remained unnoticed. He informed their Secretary, on the 19th of February, that he had no answer to make, as the Directory had taken no order on the subject; but when they did, the Envoys should be informed of it. Anxious to hear explicitly from Talleyrand before sending their final letter, whether they possessed the means to accommodate the differences with France, they solicited a personal interview with him. He appointed a day to receive them. Accordingly, they waited upon him. The particulars of this interview it is unnecessary to state.

The substance of what M. Talleyrand said was, that the Directory would require some proof of a friendly disposition on the part of the United States previous to a treaty, and he alluded very intelligibly to a loan as the means of furnishing that proof. To this it was replied that they had no power to make a loan; that such an act would violate the neutrality of the United States, and involve them in war with Great Britain. Talleyrand, in answer, said that persons in their situation must often use their discretion, and exceed their powers for the public good. That a loan could be so disguised, as effectually to prevent any interference with the neutral position of the United States; that if they desired to effect the thing, they would have no difficulty in finding the means.

Mr. Gerry had already received a proposition from Talleyrand's Secretary, to stipulate a loan to the French Government now, payable after the war, in

supplies of American produce for St. Domingo, and the French islands. He was in favor, it would seem, of negotiating a treaty on the basis of such a loan, which he thought might be so guarded, as not to violate our neutrality.[1]

Accordingly, he now observed, that Dutrimond had suggested a loan of this character, and Talleyrand signified that the proposed mode of payment was a means of covering it. If they were only sincere in their wish, said he, it would be easy to bring about the end. Marshall told Talleyrand, among other things, that for the United States to furnish money to France was, in fact, to make war; which they could not consent to do; that they could not make a stipulation of the kind, because it would absolutely transcend their powers; that, with respect to supplies to St. Domingo, no doubt could be entertained that American merchants would furnish them very abundantly, if France would permit the commerce; and a loan really payable after the war might then be negotiated.[2] But

[1] Federal Administrations, vol. ii., p. 35.

[2] As the commerce would be a perfectly lawful one with respect to the belligerents, Marshall's idea seems to have been, although not very clearly expressed, that a loan to France, payable after the war, and limited to a specific object, namely, to pay for these very supplies, might be negotiated with perfect propriety. It was not furnishing France with the means of raising money for immediate use, but enabling her at a definite time, viz., after the war, to pay for supplies which it was lawful for the merchants of a neutral nation to send to her ports.

Gerry, on the contrary, as it would appear, was in favor of stipulating a loan to France, subject only to two conditions, namely, that it should be payable after the war, and in supplies. If France could raise money on such a loan for present use, she was at liberty to do so. However disguised such a stipulation might be, it would, without doubt, have violated the neutral position of the United States. The only difference between furnishing the loan in money

Talleyrand insisted that, to prove the friendship of the United States, there must be some immediate aid, or something which might avail France.

He complained that the Envoys had not visited him, and said that, because the Directory had not given them an audience, was no reason why they should not have seen him often, and endeavored to remove the obstacles to a mutual approach. Marshall told him that their seeing the Directory, or not, was an object of no sort of concern to them; that they were perfectly independent with regard to it; but they conceived that, until their public character was in some degree recognized, and they were treated as the Ministers and representatives of their Government, they could not take upon themselves to act as Ministers; because, by doing so, they might subject themselves to some injurious circumstance to which they could not submit.

At a subsequent interview, General Pinckney told him that the Envoys considered the propositions he had suggested to them when they had previously seen him, as substantially the same as had been made to them by M. Hottinguer and M. Bellamy, and they had no power to accede to them. M. Talleyrand, without at all disavowing M. Hottinguer and M. Bellamy, proceeded to argue that it would be no departure from neutrality, to stipulate a loan after the war; but Marshall replied that any act of the American Government, on which one of the belligerent powers could raise money for immediate use, would be furnishing aid to that power, and would be taking part in the war; that he could not say what his Government

and in supplies, so far as it might affect France, would be, that she could raise money more readily and advantageously in the former case than in the latter.

would do if on the spot, but he was perfectly clear that, without additional orders, they could not do what France desired.

About two weeks after this last interview, namely, on the 18th of March, M. Talleyrand transmitted to the Envoys his answer to their letter of the 17th of January, which we have described on a previous page. He said it was disagreeable to be obliged to think that the instructions, under which they acted, had not been drawn up with the sincere intention of attaining paci fic results; 'because, far from proceeding, in their memorial, upon some avowed principles and acknowledged facts, they have inverted and confounded both, so as to be enabled to impute to the Republic all the misfortunes of a rupture, which they seem willing to produce by such a course of proceedings. It is evident that the desire, plainly declared, of supporting, at every hazard, the treaty of London, which is the principal grievance of the Republic, of adhering to the spirit in which this treaty was formed and executed, and of not granting to the Republic any of the means of reparation, which she has proposed, through the medium of the undersigned, have dictated those instructions.' 'The undersigned does not hesitate to believe, that the American nation, like the French nation, sees this state of things with regret, and does not consider its consequences without sorrow.' 'It is, therefore, only in order to smooth the way of discussions, that he declares to the Commissioners and Envoys Extraordinary, that, notwithstanding the kind of prejudice which has been entertained with respect to them, the Executive Directory is disposed to treat with that one of the three, whose opinions, presumed to be more impartial, promise, in the course of the explanations, more of that reciprocal confidence, which

is indispensable.' The Minister intended, by this language, to designate Gerry, whose views respecting a loan were supposed to be more favorable to France than those of his colleagues.

To this letter of M. Talleyrand, the Envoys presented a reply on the 3d of April. It proceeded from the pen of Marshall, and is characterized by the same ability, candor, and moderation, that distinguished his first letter. 'You contend, citizen Minister,' say the Envoys, 'that the priority of complaint is on the side of France, and that those measures, which have so injured and oppressed the people of the United States, have been produced by the previous conduct of their Government. To this the undersigned will now only observe, that if France can justly complain of any act of the Government of the United States, whether that act be prior or subsequent to the wrongs received by that Government, a disposition and a wish to do in the case what justice and friendship may require, is openly avowed, and will continue to be manifested.'

A full and searching reply to all the complaints urged against the United States by M. Talleyrand, demonstrates how insubstantial was the basis upon which they rested. The reply to two of Talleyrand's specifications of an unfriendly disposition on the part of the United States, we shall venture, at the risk of some little prolixity, to quote at length. M. Talleyrand, in pointing out the Jay Treaty as an object of complaint on the part of France, said, that the small majority by which it was sanctioned in the two Houses of Congress, and the number of respectable voices raised against it in the nation, deposed honorably in favor of the opinion which the French Government entertained of it.

'You must be sensible, citizen Minister,' was the reply, 'that the criterion by which you ascertain the merits of the instrument in question, is by no means infallible, nor can it warrant the inference you draw from it. In a republic like that of the United States, where no individual fears to utter what his judgment or his passions may dictate, where an unrestrained press conveys alike to the public eye the labors of virtue, and the efforts of particular interests, no subject which agitates and interests the public mind can unite the public voice, or entirely escape public censure. In pursuit of the same objects a difference of opinion will arise in the purest minds, from the different manner in which those objects are viewed; and there are situations in which a variety of passions combine to silence the voice of reason, and to betray the soundest judgments. In such situations, if the merit of an instrument is to be decided, not by itself, but by the approbation or disapprobation it may experience, it would surely be a safer rule to take as a guide the decision of a majority, however small that majority may be, than to follow the minority. A treaty, too, may be opposed as injurious to the United States, though it should not contain a single clause which could prejudice the interests of France. It ought not to be supposed that a treaty would, for that reason, be offensive to this Republic. . . . It is considered as having been demonstrated, that this treaty leaves the neutrality of the United States, with respect both to France and England, precisely in its former situation, and that it contains no concessions which are either unusual, or derogatory, from their alliance with this Republic. But if, in forming this judgment, the American Government has deceived itself, still it ought to be remembered that it has ever manifested a readiness to place

France on the footing of England, with respect to the articles complained of.'

Another allegation of M. Talleyrand was, 'that the journals known to be indirectly under the control of the Cabinet, have redoubled their invectives and calumnies against the Republic, its magistrates and its Envoys; and that pamphlets openly paid for by the Minister of Great Britain have reproduced, under every form, those insults and calumnies, without having ever drawn the attention of the Government to a state of things so scandalous, and which it might have repressed.' The Envoys replied thus: —

'The genius of the Constitution, and the opinions of the people of the United States, cannot be overruled by those who administer the Government. Among those principles deemed sacred in America — among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence, and would approach only with the most cautious circumspection, there is no one, of which the importance is more deeply impressed on the public mind, than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn. However desirable those measures might be, which might correct without enslaving the press, they have never yet been devised in America. No regulations exist which enable the Government to suppress what-

ever calumnies and invectives any individual may choose to offer to the public eye; or to punish such calumnies and invectives, otherwise than by a legal prosecution in courts, which are alike open to all who consider themselves as injured. Without doubt, this abuse of a valuable privilege is matter of peculiar regret when it is extended to the Government of a foreign nation. The undersigned are persuaded, it never has been so extended with the approbation of the Government of the United States. Discussions respecting the conduct of foreign powers, especially in prints respecting the rights and interests of America, are unavoidably made in a nation where public measures are the results of public opinion, and certainly do not furnish cause for reproach; but it is believed that calumny and invective have never been substituted for the manly reasoning of an enlightened and injured people, without giving pain to those who administer the affairs of the Union. Certainly this offence, if it be deemed by France of sufficient magnitude to be worthy of notice, has not been confined to this Republic. It has been still more profusely lavished on its enemies, and has even been bestowed with an unsparing hand on the Federal Government itself. Nothing can be more notorious than the calumnies and invectives with which the wisest measures, and the most virtuous characters of the United States, have been pursued and traduced. It is a calamity occasioned by, and incident to, the nature of liberty, and which can produce no serious evil to France. It is a calamity occasioned neither by the direct nor indirect influence of the American Government. In fact, that Government is believed to exercise no influence over any press.

'You must be sensible, citizen Minister, with how

much truth the same complaint might be urged on the part of the United States. You must know well, what degrading and unworthy calumnies against their Government, its principles and its officers, have been published to the world by French journalists and in French pamphlets. That Government has even been charged with betraying the best interests of the nation, with having put itself under the guidance, nay, more, with having sold itself to a foreign court. But these calumnies, atrocious as they are, have never constituted a subject of complaint against France. Had not other causes, infinitely more serious and weighty, interrupted the harmony of the two republics, it would still have remained unimpaired, and the mission of the undersigned would never have been rendered necessary.'

To the suggestion of M. Talleyrand that the Executive Directory was disposed to treat with one of the Envoys, they answered that no one of them was authorized to take upon himself a negotiation evidently intrusted, by the tenor of their powers and instructions, to the whole; nor could any two of them propose to withdraw themselves from the task committed to them by their Government, whilst a possibility remained of their performing it. They concluded their letter by requesting that, if they had failed to dissipate the prejudices which had been conceived against them, and it should be the will of the Directory to order passports for the whole, or any number of them, M. Talleyrand would accompany such passports with letters of safe conduct, which would protect the vessels in which they might respectively sail, from French cruisers.

It was, doubtless, the hope and expectation of M.

Talleyrand that Pinckney and Marshall would voluntarily leave France, upon receiving his letter of the 18th of March, in which he made the offensive distinction between them and their colleague Gerry, on the ground that the 'opinions' of the latter were more 'impartial' than theirs. In a letter to Gerry, of April 3d, he said, 'I suppose, Sir, that Messrs. Pinckney and Marshall have thought it useful and proper, in consequence of the intimations which the end of my note of the 18th of March last presents, to quit the territory of the Republic.' As the Envoys, however, had previously made a conditional application for their passports, this hint to them was quite unnecessary. The truth is, the Directory wished to get rid of Pinckney and Marshall, but, at the same time, to avoid the odium of sending them away. Having done all they could, consistently with self-respect and the honor of their country, to accomplish the objects of their mission, and having failed, without any fault on their part, they were anxious to return to the United States. But they would not leave Paris on the mere intimation of the French Minister, nor without those protections which the law of nations entitled them to demand.

Marshall told Talleyrand that this was not the manner in which a foreign Minister ought to be treated. He replied that Marshall was not a foreign Minister, but was to be considered as a private American citizen; and must obtain his passports, like others, through the Consul. To this it was answered, that he was a foreign Minister, and that the French Government could not deprive him of that character, which was conferred on him, not by Talleyrand, but by the United States; and, though the Directory might refuse to receive or to treat with him, still his country had

clothed him with the requisite powers, which he held independently of France; that if he was not acceptable to the French Government, and, in consequence, they determined to send him away, still he ought to be sent away like a Minister; that he ought to have his passports, with letters of safe conduct, which would protect him from the cruisers of France. Talleyrand replied, that, if Marshall wished for a passport, he must give in his name, stature, age, complexion, &c., to the American Consul, who would obtain one for him; that, with respect to a letter of safe conduct, it was unnecessary, as no risk from the cruisers would be incurred.[1]

Treated with studied indignities, Pinckney and Marshall, nevertheless, persisted in their demands, and passports were finally sent to them. The latter left Paris on the 12th of April, and France on the 16th; but General Pinckney obtained permission, with great difficulty, however, to remain for two or three months, on account of the critical state of his daughter's health. Gerry, who, according to Talleyrand, had manifested 'himself more disposed to lend a favorable ear to everything which might reconcile the two Republics,' was induced, by threats of immediate war against the United States, to separate from his colleagues, and stay in Paris. He steadily refused, however, to enter into a formal negotiation, and in August sailed for the United States. With fair intentions, doubtless, his conduct, nevertheless, was marked by several instances of weakness, and provoked severe criticisms.

The despatches of the Envoys, containing the facts narrated in this chapter, were published in the United

[1] Marshall's Journal. Wait's American State Papers, vol. iii., p. 394.

States, and republished in England. They reached Paris the latter part of May, and, naturally enough, attracted eager attention. Talleyrand hastened to dissipate the impressions they were calculated to make. Col. Pickering, the Secretary of State, had substituted the initials X. Y. Z. for the names of M. Hottinguer, M. Bellamy, and M. Hautval, in consequence of a promise by the Envoys that they should, in no event, be made public. Talleyrand affected an entire ignorance of the persons thus designated, and, with cool effrontery, addressed a note to Mr. Gerry, requesting their names. 'I cannot observe without surprise,' he said, 'that intriguers have profited of the insulated condition in which the Envoys of the United States have kept themselves, to make proposals and hold conversations, the object of which was evidently to deceive you.' And this was addressed to Mr. Gerry, who had Talleyrand's own assurance, that M. Bellamy *might always be relied on;* to Mr. Gerry, who had heard the propositions of the agents substantially repeated by the Minister, and was present when General Pinckney told him that his suggestions were considered by the Envoys as, in effect, the same that had been made by M. Hottinguer and M. Bellamy, the men he now styled intriguers, but then did not venture to disavow.[1]

On the 7th of June, *The Redacteur*, the official gazette, contained Talleyrand's observations on the despatches of the Envoys. They were drawn up with infinite art; and were calculated to produce an impression favorable to the purity of the French Directory. He described the despatches as a 'deplorable monument of credulity and contradictions,' and a pro-

[1] Ante, pp. 370.

vocation 'visibly suggested by the British Government.' Pinckney and Marshall, he said, manifested against France prejudices brought from America, or imbibed from the nature of the connections which they lost no time in forming at Paris; but Gerry had announced more impartiality. 'From this ill-suited union, which disclosed dispositions not very conciliatory, there must needs result, and there has, in fact, resulted a crooked and embarrassed career on the part of those Commissioners; hence their constant aversion to do what might reconcile, their eagerness to write what might disgust.' 'To come at some accommodation, some friendly explanation, frequent communications with the Minister of the Exterior were necessary. The latter complained publicly that he did not see them, and they avowed that he caused them to be often informed of this reproach; but two of the Commissioners, shielding themselves under ceremony, refused to comply with the desire. Mr. Gerry, at length, resolved to go, spoke twice with the Minister; . . . . said but little; and did not venture to decide on any thing.' In the meantime, says Talleyrand, they thought themselves bound to transmit to the President a very voluminous account of their negotiation; an account necessarily filled 'with the despicable manœuvres of all the intriguers.' 'It will be for ever inconceivable, that men, authorized to represent the United States near the French Republic, could have been for an instant deceived by manœuvres so evidently counterfeit, and that there should exist a temptation to convert the error in this respect into bad faith.'

We have not space to follow the ingenious turns and cool assurance of Talleyrand, through this curious performance. So disguised are his artifices, and so bold his criminations, that one is almost inclined to

believe that the Envoys had been 'most strangely deceived' by 'the incoherent prating of two intriguers.' It is only by again recurring to the facts that the reader is disabused of the impression that M. Talleyrand is a martyr in the cause of honor and innocence.

Apprehensions were entertained that the Envoys might remain in France until after the arrival there of their despatches. 'In that case,' wrote Cabot to Wolcott, 'they must give up their lives, or contradict their communications, or, according to the order of the day, pay a deal of money.'[1] But Pinckney had left Paris on the 19th of April, Gerry it suited the Directory to treat with a show of civility, and Marshall arrived at New York on the 17th of June. He found a high and general indignation among the people at the treatment himself and colleagues had received at Paris. He was received, wherever he appeared, with warmth and enthusiasm. These demonstrations Jefferson, naturally enough, viewed with extreme jealousy. The late events had visibly increased the strength of the Federalists, and diminished that of the Republicans. In a letter to Madison, he mentions the arrival of Marshall at New York, says that he has postponed his own departure from Philadelphia, in order to see if that circumstance would produce any new projects, and thus proceeds: — 'No doubt he there received more than hints from Hamilton as to the tone required to be assumed, yet I apprehend he is not hot enough for his friends. Livingston came with him from New York. Marshall told him they had no idea, in France, of a war with us. That Talleyrand sent passports to him and Pinckney, but none to Gerry. Upon this Gerry staid, without explaining to

[1] Federal Administrations, vol. ii., pp 47, 48.

them the reason.[1] He wrote, however, to the President by Marshall, who knew nothing of the contents of the letter. So that there must have been a previous understanding between Talleyrand and Gerry.

'Marshall was received here [Philadelphia] with the utmost eclat. The Secretary of State and many carriages, with all the city cavalry, went to Frankford to meet him, and, on his arrival here in the evening, the bells rung till late in the night, and immense crowds were collected to see and make part of the show, which was circuitously paraded through the streets before he was set down at the city tavern.

'All this,' Jefferson characteristically adds, 'was to secure him to their views, that he might say nothing which would oppose the game they have been playing. Since his arrival, I can hear nothing directly from him, while they are disseminating through the town things, as from him, diametrically opposite to what he said to Livingston.'[2]

Congress being at this time in session, a public dinner was given to him by members of both Houses, 'as an evidence of affection for his person, and of their grateful approbation of the patriotic firmness with which he sustained the dignity of his country during his important mission.'

Marshall now returned to Virginia, (where he was received with every demonstration of respect,) and re-

[1] Marshall could not have told Livingston this, because Gerry had agreed with Talleyrand to remain, had told his colleagues that he intended to remain, and this, too, before the passports were sent. His not receiving a passport had nothing to do with his staying. It would have been sent, had he demanded it.

[2] Jefferson's Works, vol. iv., p. 249. June 21st, 1798. We have quoted Jefferson's letter for the facts which it contains; his conjectures are not so important.

sumed his labors at the Bar. But his determination to withdraw from political life was overcome by the clouded state of affairs, and the earnest appeals that were made to him, to come forward, at such a juncture, and engage in the public service. In the next chapter we shall view him as a member of Congress.

CHAPTER IX.

1799 — 1800.

MEMBER OF CONGRESS.

It was the good fortune of Marshall, as we have already had occasion to observe, to enjoy the unqualified respect and esteem of Washington; and it was a circumstance creditable to Washington's successor in the Presidency, that he invariably manifested similar sentiments towards him, and, at last, placed him in that exalted judicial position where, for so long a period, he rendered such signal services, and achieved such lasting and honorable fame.

On the death of Judge Wilson, in the summer of 1798, Mr. Adams fixed upon Marshall as his successor. 'General Marshall or Bushrod Washington,' thus he wrote the Secretary of State, 'will succeed Judge Wilson, if you have not some other gentleman to propose, who, in your opinion, can better promote the public honor and interest. Marshall is first in age, rank, and public services, probably not second in talents.'[1] In a subsequent letter to the Secretary, he says, 'The name, the connections, the character, the merit, and abilities of Mr. Washington are greatly respected. But I still think General Marshall ought to be preferred. Of the three Envoys, the conduct of

[1] Adams' Works, vol. viii., p. 596. September 14th, 1798.

Marshall alone has been entirely satisfactory, and ought to be marked by the most decided approbation of the public.[1] He has raised the American people in their own esteem, and if the influence of truth and justice, reason and argument, is not lost in Europe, he has raised the consideration of the United States in that quarter. He is older at the Bar than Mr. Washington; and you and I know by experience that seniority at the Bar is nearly as much regarded as it is in the army. If Mr. Marshall should decline, I should next think of Mr. Washington.'[2] The post was accordingly offered Marshall; but insurmountable considerations, he wrote the Secretary of State, obliged him to decline it. Subsequently, it was conferred on Bushrod Washington.

One of the reasons, and, perhaps, the chief reason, that probably induced Marshall to decline the office thus tendered him, was the resolution he had reluctantly formed to become a candidate for Congress. It was at the earnest instance of Washington that he thus consented to forego his determination to remain at the Bar, and embark on the angry sea of politics. 'I learnt with much pleasure,' wrote the former to his nephew, Bushrod Washington, 'from the postscript to your letter, of General Marshall's intention to make me a visit. I wish it of all things; and it is from the ardent desire I have to see him, that I have not delayed a moment to express it, lest, if he should have intended it on his way to Frederic, and hear of my indisposition, he might change his route. I can add, with sincerity and truth, that, if you can make it comport

[1] Compare letter to Cunningham, of November 7th, 1808.

[2] Adams' Works, vol. viii., p. 597. Sept. 26th, 1798. Adams, at this time, was at Quincy.

with your business, I should be exceedingly happy to see you along with him. The crisis is important. The temper of the people in this State, at least, in some places, is so violent and outrageous, that I wish to converse with General Marshall and yourself on the elections, which must soon come.'[1]

Marshall and Bushrod Washington accordingly visited Mount Vernon, and, while there, the former was induced, by the urgent wishes of General Washington, to come forward as a candidate for Congress. The following anecdote concerning this visit, though erroneous as to the time when it occurred, shows that there were personal incidents connected with it, apart from public considerations, that gave Washington much pleasure. 'He was accustomed sometimes to tell the following story: — On one occasion, during a visit he paid to Mount Vernon while President, he had invited the company of two distinguished lawyers, each of whom afterwards attained to the highest judicial situations in this country. They came on horseback, and, for convenience, or some other purpose, had bestowed their wardrobe in the same pair of saddle-bags, each one occupying his side. On their arrival, wet to the skin by a shower of rain, they were shown into a chamber to change their garments. One unlocked his side of the bag, and the first thing he drew forth was a black bottle of whiskey. He insisted that this was his companion's repository; but, on unlocking the other, there was found a huge twist of tobacco, a few pieces of corn-bread, and the complete equipment of a wagoner's pack-saddle. They had exchanged saddle-bags with some traveller on the way, and finally made their appearance in borrowed clothes, that fitted them

[1] Washington's Writings, vol. xi., p. 292. August 27th, 1798

most ludicrously. The General was highly diverted, and amused himself with anticipating the dismay of the wagoner when he discovered this oversight of the men of law. It was during this visit that Washington prevailed on one of his guests to enter into public life, and thus secured to his country the services of one of the most distinguished magistrates of this or any other age.'[1]

The election contest upon which Marshall now entered was a very severe one. The public feeling was in a peculiarly inflamed state, and nowhere more so than in Virginia. Attacks on private character, imputation of unworthy motives, suspicions and conjectures, were freely employed as instruments of party warfare; and fortunate was that public character who was not more or less assailed by them. Marshall no sooner announced himself as a candidate, than he became a mark for all the shafts of party calumny. One of the means used to procure his defeat was the circulation of a malicious report through the district, that Patrick Henry was unfriendly to his election. When Mr. Henry was informed of the use that was being made of his name, he addressed a letter to his friend Archibald Blair; and the following extract will show the estimation in which he held the future Chief Justice: —

'General Marshall and his colleagues,' thus he wrote, 'exhibited the American character as respectable. France, in the period of her most triumphant fortune, beheld them as unappalled. Her threats left them as she found them, mild, temperate, firm. Can it be thought, that, with these sentiments, I should

[1] Paulding's Life of Washington, vol. II., p. 191.

utter anything tending to prejudice General Marshall's election. Very far from it, indeed. Independently of the high gratification I felt from his public Ministry, he ever stood high in my esteem as a private citizen. His temper and disposition were always pleasant, his talents and integrity unquestioned. These things are sufficient to place that gentleman far above any competition in the district for Congress. But when you add the particular information and insight which he has gained, and is able to communicate to our public councils, it is really astonishing that even blindness itself should hesitate in the choice. But it is to be observed, that the efforts of France are to loosen the confidence of the people everywhere in the public functionaries, and to blacken characters most eminently distinguished for virtue, talents, and public confidence; thus smoothing the way to conquest, or those claims of superiority as abhorrent to my mind as conquest, from whatever quarter they may come.

'Tell Marshall I love him, because he felt and acted as a republican, as an American. The story of the Scotch merchants and old tories voting for him is too stale, childish, and foolish, and is a French *finesse;* an appeal to prejudice, not to reason and good sense. . . . As to the particular words stated by you, and said to come from me, I do not recollect saying them. But, certain I am, I never said anything derogatory to General Marshall; but, on the contrary, I really should give him my vote for Congress, preferably to any citizen in the State at this juncture, one only excepted, and that one is in another line.'[1]

[1] Washington's Writings, vol. xi., p. 558, January 8th, 1799. General Washington is supposed to be the citizen whom alone Mr. Henry would prefer to Marshall, and he, at that time, was in command of the army.

Another calumny employed to defeat his election is disclosed in the following letter from Marshall to Washington: —

'You may possibly have seen,' he says, 'a paragraph in a late publication, stating that several important offices in the gift of the Executive, and among others, that of Secretary of State, had been attainable by me. Few of the unpleasant occurrences produced by my declaration as a candidate for Congress (and they have been very abundant) have given me more real chagrin than this. To make a parade of proffered offices is a vanity, which I trust I do not possess; but to boast of one never in my power would argue a littleness of mind at which I ought to blush. I know not how the author may have acquired his information, but I beg leave to assure you that he never received it directly nor indirectly from me. I had no previous knowledge that such a publication was designed, or I would certainly have suppressed so much of it as relates to this subject. The writer was unquestionably actuated by a wish to serve me, and by resentment at the various malignant calumnies which have been so profusely bestowed on me. One of these was, that I only wished a seat in Congress for the purpose of obtaining some office, which my devotion to the Administration might procure. To repel this was obviously the motive of the indiscreet publication I so much regret.

'A wish to rescue myself, in your opinion, from the imputation of an idle vanity, which forms, if I know myself, no part of my character, will, I trust, apologize for the trouble this explanation may give you.'[1] But

[1] Writings of Washington, vol. xi., p. 424. May 1st, 1799.

to Washington, who knew him, this explanation was unnecessary. 'I am sorry to find,' thus he wrote in reply, 'that the publication you allude to should have given you a moment's disquietude. I can assure you, it made no impression on my mind, of the tendency apprehended by you.'[1]

Notwithstanding the persevering and systematic efforts that were made to effect a different result; notwithstanding the 'gleam of Federalism in Virginia' was fast expiring, Marshall, to the honor of the Richmond district, be it said, was elected. His majority, however, was small; and that was the only drawback to the gratification of his friends. 'The election of General Lee and Marshall,' wrote Washington, 'is grateful to my feelings. I wish, however, both of them had been elected by greater majorities; but they are elected, and that alone is pleasing. As the tide is turned, I hope it will come in with a full flow; but this will not happen, if there is any relaxation on the part of the Federalists.'[2]

Marshall took his seat in Congress at the opening of the session, in December, 1799. The state of parties in the public councils, and the part Marshall was thought likely to play there, are thus described in a letter from Wolcott to Fisher Ames: —

'The Federal party,' he says, 'is composed of the old members who were generally re-elected in the Northern, with new members from the Southern States. New York has sent an anti-Federal majority; Pennsylvania has done the same; opposition princi-

[1] Writings of Washington, vol. xi., p. 424. May 5th, 1799.

[2] Ibid., p. 425. May 5th, 1799. Letter to Bushrod Washington. The election took place in April, 1799.

ples are gaining ground in New Jersey and Maryland, and, in the present Congress, the votes of these States will be fluctuating and undecided. A number of distinguished men appear from the southward, who are not pledged by any act to support the system of the last Congress; these men will pay great respect to the opinions of General Marshall. He is, doubtless, a man of virtue and distinguished talents; but he will think much of the State of Virginia, and is too much disposed to govern the world according to rules of logic. He will read and expound the Constitution as if it were a penal statute, and will sometimes be embarrassed with doubts, of which his friends will not perceive the importance.'[1]

The opinion Wolcott thus expressed of Marshall was also professed by his political adversaries. They 'allege that he is a mere lawyer; that his mind has been so long trammelled by judicial precedent, so long habituated to the quart and tierce of forensic digladiation, (as Doctor Johnson would probably have called it,) as to be unequal to the discussion of a great question of State.'[2] This sort of criticism will be deemed less singular, when we reflect that it has been employed with respect to almost all distinguished lawyers who have entered political life; that in England, especially, the habits and learning of the Bar have been regarded as inconsistent with those bold, unfettered, comprehensive views that mark the character of the great statesman; and that, besides the evident motive which his political opponents had to depreciate his statesmanship, Wolcott and the majority of the Cabinet were equally

[1] Federal Administrations, vol. ii., p. 314.

[2] The British Spy, p. 183,

liable to undervalue his political sagacity, from the fact that he differed with them on a question of policy which they deemed of capital importance, namely, the mission to France; he approving, and they strongly disapproving it. Nevertheless, when it is considered that Marshall, throughout his long judicial career, invariably maintained what has been termed the liberal construction of the Constitution, and that the bias of his mind was to general principles rather than to technical distinctions, it must strike the reader as a little odd that he should have been thought, at any period of his public life to have brought to the exposition of that instrument narrow rules, or limited views. At the same time, it may be admitted that his peculiar excellence was judicial rather than political; that he was better fitted to explore the mazes of ingenious argument, to pronounce clear, impartial judgment on the systems and measures of others, than to devise systems and measures himself; and that the forming hand of nature intended him for a great magistrate, rather than a great political leader.

The answer to the President's speech was drafted by Marshall, who was Chairman of the Committee appointed for that purpose. It was a delicate task. The Federalists were divided in sentiment as to the propriety of the mission to France; those from the Northern States, for the most part, denouncing it, while the new members from the South, coming from a region of country where the anti-Federalists were rapidly gaining the ascendency, and where they had been beset by the popular cry, that the country was being hurried into war with France in consequence of British influence, and that peace was attainable, if right steps were taken, approved it. In this contrariety of opinion, Marshall had a difficult duty to per-

form, and that he failed to please all is not singular. In guarded, moderate language, the address expressed approbation of the mission, and, in that form, 'passed with silent dissent.'[1]

When we reflect how solicitous Washington was, that Marshall should enter Congress, and how gratified he was at his election, we cannot fail to be struck with the circumstance, that it was among the first of his Congressional duties, to announce the death of that great man, whose loss the whole nation deplored. The rumor of Washington's decease reached Philadelphia on the 18th of December. On that day, Marshall, 'in a voice that bespoke the anguish of his mind, and a countenance expressive of the deepest regret,' rose, and after stating the calamity that had probably befallen the country, moved an adjournment of the House. The next day, with 'suppressed voice, and deep emotion,' he addressed the Chair as follows: —

'Mr. Speaker: — The melancholy event which was yesterday announced with doubt, has been rendered but too certain. Our Washington is no more! The Hero, the Sage, and the Patriot of America—the man on whom, in times of danger, every eye was turned, and all hopes were placed—lives now only in his own great actions, and in the hearts of an affectionate and afflicted people.

'If, Sir, it had not been usual openly to testify respect for the memory of those whom Heaven had selected as its instruments for dispensing good to men, yet such has been the uncommon worth, and such the extraordinary incidents which have marked the life

[1] Federal Administrations, vol. ii., p. 314. See this address in Benton's Debates of Congress, vol. ii., p. 431.

of him whose loss we all deplore, that the whole American nation, impelled by the same feelings, would call with one voice for a public manifestation of that sorrow which is so deep and so universal.

'More than any other individual, and as much as to any one individual was possible, has he contributed to found this, our wide-spreading empire, and to give to the Western world its independence and freedom. Having effected the great object for which he was placed at the head of our armies, we have seen him converting the sword into the ploughshare, and voluntarily sinking the soldier in the citizen.'

'Having been twice unanimously chosen the Chief Magistrate of a free people, we see him, at a time when his re-election, with the universal suffrage, could not have been doubted, affording to the world a rare instance of moderation, by withdrawing from his high station to the peaceful walks of private life.

'However the public confidence may change, and the public affections fluctuate with respect to others, yet, with respect to him, they have in war and in peace, in public and private life, been as steady as his own firm mind, and as constant as his own exalted virtues.

'Let us then, Mr. Speaker, pay the last tribute of respect and affection to our departed friend — let the Grand Council of the nation display those sentiments which the nation feels.

'For this purpose, I hold in my hand some resolutions, which I will take the liberty to offer to the House.'[1]

[1] These were the resolutions drafted by General Lee; the last of which described Washington as 'first in war, first in peace, and first in the hearts of his countrymen.'

To every capital measure of Washington's Administration, Marshall, both in public and private life, had given an ardent and able support; to the Administration of John Adams he gave a similar support, unless, indeed, we except his approval of the mission to France, which was a measure of the President's, a measure disapproved by his Cabinet, and the leading Federal members of Congress, and, also, his vote to repeal the obnoxious clause of the sedition act.[1] This act had everywhere, and particularly in Virginia, encountered the most violent hostility. It was an exceedingly impolitic measure, and Marshall, during the canvass that resulted in his election, had announced his purpose to vote for its repeal; not because it was unconstitutional, but because it was inexpedient. That pledge, he now redeemed.

He did not often mingle in the debates, while he remained a member of the House; but when he did, he made an impression upon his auditors, not easily effaced. His career in Congress was especially marked by his speech in the celebrated case of Jonathan Robbins; a speech which forever settled the questions of constitutional law involved in it. Thomas Nash, who assumed the name of Jonathan Robbins, and claimed to be a citizen of the United States, impressed by the British, was committed to jail, in Charleston, South Carolina, at the instance of the British Consul, on suspicion of having been an accomplice in piracy and murder on board the British frigate Hermione. The English Minister having made a requisition to the President for the delivery of Nash as a fugitive from justice, under a provision of the Jay treaty, the latter advised and requested the Federal judge at Charleston

[1] We refer to the clause relating to seditious libels.

to deliver him up, provided such evidence of his criminality was produced as, by the laws of the United States, or of South Carolina, would justify his commitment for trial, if the offence had been committed within the jurisdiction of the United States. Nash was accordingly delivered to the British Consul, was afterwards tried by a court-martial, found guilty of mutiny and murder, and executed. He acknowledged, before his death, that he was an Irishman.

The delivery of Nash to the British authorities occasioned a great outcry. Before the people, it was asserted that he was an American citizen, had been impressed, and was now surrendered as a murderer, for having committed a homicide in the attempt to liberate himself from illegal confinement. But, in Congress, it was admitted that he was an Irishman, and guilty of the crimes for which he suffered death. The ground of complaint was, that the question whether he should be given up, belonged exclusively to the courts, and, consequently, the advice and request of the President to have him delivered up, upon the conditions we have stated, was a dangerous interference of Executive with judicial authority.

In opposition to this view of the matter, and in defence of the course pursued by the President, Marshall addressed the House. His speech is strictly argumentative, and clearly demonstrates three propositions.

First. That the case of Nash, as stated to the President, was completely within the meaning of the rendition clause of the Jay Treaty.

Secondly. That it constituted a question for Executive and not judicial decision.

Thirdly. That, in deciding it, the President was not chargeable with an interference with judicial functions.

The train of reasoning that led him to these results elicited, at the time, the highest admiration, and has, ever since, been equally applauded. We have space for only a single extract. It relates, however, to an observation which had been made in the course of the debate, and is not directly connected with the line of his argument. But it contains sentiments which were so well calculated to interest the public feelings; sentiments, too, so worthy of him, that we have selected it for quotation.

'The gentleman from Pennsylvania [Mr. Gallatin] has said that an impressed American seaman, who should commit homicide for the purpose of liberating himself from the vessel in which he was confined, ought not to be given up as a murderer. In this I concur entirely with that gentleman. I believe the opinion to be unquestionably correct, as are the reasons he has given in support of it. I never heard any American avow a contrary sentiment, nor do I believe a contrary sentiment can find a place in the bosom of an American. I cannot pretend, and do not pretend to know the opinion of the Executive on this subject, because I have never heard the opinions of that department; but I feel the most perfect conviction, founded on the general conduct of the Government, that it could never surrender an impressed American to the nation which, in making the impressment, committed a national injury. This belief is in no degree shaken by the conduct of the Executive in this particular case. . . .

'The President has decided that a murder committed on board a British frigate on the high seas, is within the jurisdiction of that nation, and, consequently, within the twenty-seventh article of its treaty

with the United States. He therefore directed Thomas Nash to be delivered to the British Minister, if satisfactory evidence of the murder should be adduced. The sufficiency of the evidence was submitted entirely to the Judge. If Thomas Nash had committed a murder, the decision was that he should be surrendered to the British Minister; but if he had not committed a murder, he was not to be surrendered. Had Thomas Nash been an impressed American, the homicide on board the Hermione would, most certainly, not have been a murder.

'The act of impressing an American, is an act of lawless violence. The confinement on board a vessel is a continuation of the violence, and an additional outrage. Death committed within the United States, in resisting such violence, is not murder, and the person giving the wound cannot be treated as a murderer. Thomas Nash was only to be delivered up to justice on such evidence as, had the fact been committed within the United States, would be sufficient to have induced his commitment and trial for murder. Of consequence, the decision of the President was so expressed, as to exclude the case of an impressed American liberating himself by homicide.'

Though the case of Nash had been made a party question, so conclusive was the argument in support of the President's course, that many of the Democratic members voted in its justification, and the resolutions censuring it were lost by a vote of sixty-one to thirty-five. Out of doors, too, the fierce invective and denunciation that had been called forth by a misapprehension of the case, were silenced, and the public opinion was rescued from the prejudices that had surrounded it.

Congress adjourned on the 14th of May, and Marshall having been appointed Secretary of State, resigned his seat in that body. We have seen with what difficulty he was elected; and, as an evidence of the strength of the current that was setting against the Federalists, we may mention that, at the subsequent election, his place was supplied by a Republican. 'Mr. Mayo, who was proposed to succeed General Marshall, lost his election by an immense majority, was grossly insulted in public by a brother-in-law of the late Senator Taylor, and was afterwards wounded by him in a duel.'[1]

[1] Wolcott to Ames, August 10th, 1800. Federal Administrations, vol. ii., pp. 400, 404.

CHAPTER X.

1800 – 1801.

SECRETARY OF STATE.

The Cabinet of President Adams, as described at the time, was an exceedingly disjointed one. They were, as he afterwards said, 'a legacy of Secretaries left him by General Washington.' The Secretary of State was Timothy Pickering; of the Treasury, Oliver Wolcott; of War, James M'Henry; of the Navy, Benjamin Stoddart;[1] and the Attorney-General was Charles Lee.

The first, Mr. Adams has described with characteristic point, and in terms which, it has been observed, would be equally applicable to himself. 'He [Mr. Pickering] is, for anything I know, a good son, husband, father, grandfather, brother, uncle, and cousin; but he is a man in a mask, sometimes of silk, sometimes of iron, and sometimes of brass; and he can change them very suddenly, and with some dexterity.' 'He is extremely susceptible of violent and inveterate prejudices; and yet, such are the contradictions to be found in human characters, he is capable of very sudden and violent transitions from one extreme to an opposite extreme. Under the simple appearance of a

[1] Stoddart was appointed by Mr. Adams; the Navy Department being created after his accession to the Presidency.

bald head and *straight hair*, and under professions of profound republicanism, he conceals an ardent ambition, envious of every superior, and impatient of obscurity. I always think of a coal-pit, covered over with red earth, glowing within, but unable to conceal its internal heat, for the interstices which let out the smoke, and now and then a flash of flame.'

Wolcott, though not belonging to the highest grade of public character, was a man of abilities; energetic, ardent, and sagacious. He administered the affairs of the Treasury with great prudence, and graced the position he occupied.

M'Henry, though 'sensible, judicious, well-informed, of an integrity never questioned, of a temper which, though firm in the support of principles, had too much moderation and amenity to offend by the manner of doing it,'[1] did not possess the peculiar qualifications required for the duties of the War Department. He wanted skill in the details of administration. 'The diffidence which he feels,' wrote Wolcott, 'exposes his business to delays, and he sometimes commits mistakes which his enemies employ to impair his influence.'[2]

The Secretary of the Navy, and the Attorney-General, are thus described, and by the same hand: —

'Mr. Stoddart,' he says, 'is a man of great sagacity, and conducts the business of his Department with success and energy; he means to be popular; he has more of the confidence of the President than any offi-

[1] Thus described by Hamilton.

[2] Wolcott to Ames, December 29th, 1799. Federal Administrations, vol. ii., p. 315.

cer of the Government. He professes to know less than he really knows, and to be unequal to the task of forming or understanding a political system. He will have much influence in the Government, and avoid taking his share of the responsibility.

'Mr. Lee is a sensible man, and I think a candid man, who thinks much of Virginia. He fears disorders and a dissolution of the Union. He frequently dissents to what is proposed by others, and approves the sentiments of the President; but, with respect to *measures*, will rarely take an active part'.[1]

The differences between the President and his three principal Secretaries, Pickering, M'Henry, and Wolcott, respecting the mission to France, and the acrimonious feelings growing out of those differences, led to important changes in the Cabinet. M'Henry was forced to resign, and Pickering, refusing to resign, was dismissed. Wolcott was retained, it was said, because the President feared derangements in the affairs of the Treasury;[2] but the more probable cause is, that he was not informed as to the extent of his hostility. Wolcott, however, voluntarily resigned before the close of the year.

M'Henry resigned on the 6th of May, 1800; the re-

[1] Wolcott to Ames, December 29th, 1799. Federal Administrations, vol. ii., p. 315.

[2] M'Henry to M'Henry, May 20th, 1800. Ibid., pp. 346, 348. It must be admitted that Adams had just cause for the removal of his obnoxious Secretaries. He certainly was entitled to the aid of a Cabinet who sympathized with his views. But Pickering, Wolcott, and M'Henry not only condemned his policy, but were personally opposed to him. Pickering hated him, openly denounced him, and all desired to get rid of him. Mutual confidence was gone. The wonder is, considering Adams' impetuous temperament, that they were not dismissed at an earlier moment.

signation to take effect on the 1st of June. On the 7th, Marshall was nominated as his successor. 'He was never consulted, and had no intimation that M'Henry was to retire.'[1] This appointment he declined; but, on the 13th, accepted the Department of State, from which Pickering had been removed the day before. The War Department was filled by Mr. Dexter.

The accession of Marshall to the Cabinet, under the circumstances we have described, caused not the slightest diminution of friendship between Pickering and himself, nor the least abatement of confidence and respect on the part of those who sympathized with the discarded Secretaries. Even Wolcott applauds his acceptance of the post assigned him, and bears testimony to the importance of his services. 'Let me not be suspected,' thus he writes, 'of entertaining the harsh opinion that the gentlemen lately appointed to office are not independent men. I highly respect and esteem them both, and consider their acceptance of their offices as the best evidence of their patriotism. . . I consider General Marshall and Mr. Dexter as more than Secretaries — as State Conservators — the value of whose services ought to be estimated, not only by the good they do, but by the mischief they have prevented. If I am not mistaken, however, General Marshall will find himself out of his proper element.'[2]

'But,' says Mr. Adams, 'my new Minister, Marshall, did all to my entire satisfaction,' and he might have added, to the public satisfaction also. His instructions to Mr. King, our Minister at the Court of St. James,

[1] Wolcott to Ames, August 10th, 1800. Federal Administrations, vol. ii., pp. 400, 402.

[2] Ibid.

respecting the claims of British creditors, and neutral rights, have always, deservedly, held high rank in the roll of American State papers. The pending negotiations with France threatened to compromit us with England, as the negotiations with England six years before had threatened to involve us in war with France. But this pretension, that one nation may interfere with the concerns of another nation, equally independent and sovereign as itself, was never submitted to by the United States. The Jay treaty was ratified in spite of the clamors and threats of France, and the negotiations with France were prosecuted to a successful conclusion, notwithstanding the jealousy of England. 'The United States,' said Marshall, in a despatch to Mr. King, 'do not hold themselves in any degree responsible to France or to Great Britain for their negotiations with the one or the other of those Powers; but they are ready to make amicable and reasonable explanations with either. The aggressions sometimes of one and sometimes of another belligerent Power, have forced us to contemplate and prepare for war as a probable event. We have repelled, and we will continue to repel, injuries not doubtful in their nature, and hostilities not to be misunderstood. But this is a situation of necessity, not of choice. It is one in which we are placed, not by our own acts, but by the acts of others, and which we change as soon as the conduct of others will permit us to change it.

The Presidential election in 1800 was conducted with great violence, and resulted, as is well known, in the defeat of Mr. Adams. His competitor was the only public character, it is believed, towards whom Marshall ever imbibed and retained feelings of personal hostility. He had no confidence either in his politics or morals. When, therefore, it was ascertained that the

House of Representatives would be compelled to choose between Jefferson and Burr for President, he inclined to the opinion that the Federalists should support the latter. A letter from Hamilton, however, portraying the character of Burr, presented the matter in a different light. 'Being no longer in the House of Representatives,' thus he wrote Hamilton, 'and, consequently, compelled by no duty to decide between them, my own mind had scarcely determined to which of these gentlemen the preference was due. To Mr. Jefferson, whose political character is better known than that of Mr. Burr, I have felt almost insuperable objections. His foreign prejudices seem to me totally to unfit him for the Chief Magistracy of a nation, which cannot indulge those prejudices without sustaining deep and permanent injury. In addition to this solid and immovable objection, Mr. Jefferson appears to me to be a man who will embody himself with the House of Representatives. By weakening the office of President, he will increase his personal power. He will diminish his responsibility, sap the fundamental principles of the Government, and become the leader of that party which is about to constitute the majority of the Legislature. The morals of the author of the letter to Mazzei cannot be pure. With these impressions concerning Mr. Jefferson, I was, in some degree, disposed to view with less apprehension any other characters, and to consider the alternative now offered us as a circumstance not to be entirely neglected.

'Your representation of Mr. Burr, with whom I am entirely unacquainted, shows that from him still greater danger than even from Mr. Jefferson may be apprehended. Such a man as you describe is more to

be feared, and may do more immediate, if not greater, mischief. Believing that you know him well, and are impartial, my preference would certainly not be for him; but I can take no part in this business. I cannot bring myself to aid Mr. Jefferson. Perhaps respect for myself should, in my present situation, deter me from using any influence (if, indeed, I possess any) in support of either gentleman. Although no consideration could induce me to be the Secretary of State while there was a President whose political system I believed to be at variance with my own, yet this cannot be so well known to others, and it might be suspected that a desire to be well with the successful candidate had, in some degree, governed my conduct.'[1]

With such sentiments, and a line of conduct, uniform and consistent, in support of Federal measures, unless his concurrence with the President respecting the mission to France, and his opposition to the sedition act, be exceptions, it was yet reported, before the result of the election was known, that, whatever the event, he would not voluntarily retire from his post. 'I have been told,' wrote M'Henry, that 'Mr. Marshall has signified that he does not mean to resign in the event of Mr. Jefferson being elected President, but to wait most patiently the development of his politics. Will there, my friend, be so great an antipathy between the politics of the two gentlemen, that one of them must fly off from the other?'[2] To this Wolcott thus replied:— 'The issue of the election is uncertain, but if Mr. Jefferson should be chosen, Mr. Marshall will certainly

[1] Marshall to Hamilton, January 1st, 1801. Hamilton's Works, vol. vi., p. 501.

[2] M'Henry to Wolcott, November 9th, 1800. Federal Administrations, vol. ii., p. 445.

retire. The opposition of sentiment between these men appears to be decided, and, I believe, is unchangeable; what you have heard is, therefore, a mistake.'[1]

Marshall continued to discharge the duties of the State Department until the close of Mr. Adams' Administration, on the 4th of March, 1801. He had, however, in the meantime, as we shall see in the next chapter, been appointed Chief Justice of the United States.

[1] November 26th, 1800. Ibid., p. 447.

CHAPTER XI.

1801 — 1835.

CHIEF JUSTICE OF THE UNITED STATES.

Upon the resignation of Chief Justice Ellsworth, Jay was nominated as his successor; but he declined the appointment. A very general expectation was then entertained that the vacant post would be tendered to Judge Patterson. He stood high in the estimation of the Bar for learning and abilities; nor was the President insensible to his merits. But Mr. Adams objected to his nomination, it is said, lest it might wound the feelings of Judge Cushing, an old friend, and the senior member of the Court. Looking, therefore, beyond the bench for a suitable person to fill the office, his 'prompt and spontaneous choice' fell upon John Marshall. Accordingly, on the 31st of January, 1801, he received the appointment of Chief Justice of the United States.

He had now attained the age of forty-five. His personal appearance at this period of his life has been thus described — 'The Chief Justice of the United States is, in his person, tall, meagre, emaciated: his muscles relaxed, and his joints so loosely connected, as not only to disqualify him, apparently, for any vigorous exertion of body, but to destroy everything like harmony in his air and movements. Indeed, in his

whole appearance and demeanor; dress, attitudes, gesture; sitting, standing, or walking; he is as far removed from the idolized graces of Lord Chesterfield, as any other gentleman on earth. His head and face are small, in proportion to his height; his complexion swarthy; the muscles of his face, being relaxed, make him appear to be fifty years of age, nor can he be much younger. His countenance has a faithful expression of great good humor and hilarity; while his black eyes, that unerring index, possess an irradiating spirit which proclaims the imperial powers of the mind that sits enthroned within.'[1]

Several years later, Judge Story, then a young man of thirty, who had gone to Washington to argue the case of Fletcher *v.* Peck,[2] communicated to a friend the following description of the Chief Justice: —

'Marshall,' he says, 'is of a tall, slender figure, not graceful nor imposing, but erect and steady. His hair is black, his eyes small and twinkling, his forehead rather low, but his features are, in general, harmonious. His manners are plain, yet dignified; and an unaffected modesty diffuses itself through all his actions. His dress is very simple, yet neat; his language chaste, but hardly elegant; it does not flow rapidly, but it seldom wants precision. In conversation, he is quite familiar, but is occasionally embarrassed by a hesitancy and drawling. His thoughts are always clear and ingenious, sometimes striking, and not often inconclusive; he possesses great subtlety of mind, but it is only occasionally exhibited. I love his laugh —it is too hearty for an intriguer — and his good tem-

[1] The British Spy, p. 178

[2] Cranch, vol. vi., p. 137.

per and unwearied patience are equally agreeable on the Bench and in the study. His genius is, in my opinion, vigorous and powerful, less rapid than discriminating, and less vivid than uniform in its light. He examines the intricacies of a subject with calm and persevering circumspection, and unravels the mysteries with irresistible acuteness. He has not the majesty and compactness of thought of Dr. Johnson; but, in subtle logic, he is no unworthy disciple of David Hume.'[1]

'There is no man in the Court that strikes me like Marshall,' wrote Daniel Webster when serving as a member of Congress from New Hampshire. 'He is a plain man, looking very much like Col. Adams, and about three inches taller. I have never seen a man of whose intellect I had a higher opinion.'[2] And the impression thus early made upon Mr. Webster was confirmed and strengthened by his subsequent practice in the Supreme Court. Alluding to the common expression of the Chief Justice, 'it is admitted,' he once remarked to Judge Story, 'when Judge Marshall says, it is admitted, Sir, I am preparing for a bomb to burst over my head, and demolish all my points.'[3]

When Marshall first came to the Bench, his distinguished talents were known and recognized; but as time advanced, and his abilities were more conspicu-

[1] Story's Life and Letters, vol. i., p. 166. Letter to Fay, February 25th, 1808.

[2] Private Correspondence of Daniel Webster, vol. i., p. 243. Letter to Ezekiel Webster, March 28th, 1814.

[3] Story's Life and Letters, vol. ii., p. 505.

ously exhibited, and the winning graces of his daily life more generally observed, he came to be regarded by the Bar and the country with reverence and affection. If we except Washington, it may be safely asserted, that no American citizen, either in public or private life, has been so universally beloved and esteemed. He occupied the post of Chief Justice during the long period of thirty-four years, and thirty-two volumes of reports, in which his decisions are collected and preserved, attest the extent, variety, and importance of his labors. In all coming time, the student of international and constitutional jurisprudence will there discover that intellectual power, that depth of investigation, and wisdom of decision, which gave him such a commanding position among the jurists of his time.

He combined, in a remarkable degree, the qualities that constitute a great magistrate; a mind which no sophistry or subtlety could mislead; a firmness that nothing could shake, untiring patience, and spotless integrity. In legal acquirements, indeed, he has been surpassed by others. He was more familiar with principles than cases, and more 'knowing' than 'learned.' 'His mind,' said a gifted cotemporary, 'is not very richly stored with knowledge; but it is so creative, so well organized by nature, or disciplined by early education, and constant habits of systematic thinking, that he embraces every subject with the clearness and facility of one prepared by previous study to comprehend and explain it. So perfect is his analysis, that he extracts the whole matter, the kernel of inquiry, unbroken, clean, and entire. In this process, such are the instinctive neatness and precision of his mind, that no superfluous thought, or even word, ever presents itself, and still he says everything that seems appro-

priate to the subject.'[1] It was the rare faculty which he possessed, of detecting intuitively, as it were, the decisive point of a case, that particularly distinguished him. 'It was matter of surprise,' says Judge Story, 'to see how easily he grasped the leading principles of a case, and cleared it of all its accidental incumbrances; how readily he evolved the true points of the controversy, even when it was manifest, that he never before had caught even a glimpse of the learning, upon which it depended.'[2]

It has been said of Fox, that, owing to his want of extensive information, his conversation degenerated into argument. He challenged propositions, and discussed facts, in order to fix and satisfy his own mind. For a similar reason, perhaps, Marshall courted and delighted in the discussions of the Bar. 'He was solicitous,' says the authority we have just quoted, 'to hear arguments; and not to decide causes without them. And no Judge ever profited more by them. No matter whether the subject was new or old; familiar to his thoughts, or remote from them; buried under a mass of obsolete learning, or developed for the first time yesterday; whatever was its nature, he courted argument, nay, he demanded it.'[3] And, says Mr. Binney, 'whether the argument was animated or dull, instructive or superficial, the regard of his expressive eye was an assurance that nothing that ought to affect the cause was lost by inattention or indifference; and the courtesy of his general manner was only so far restrained on the Bench, as was necessary for the dignity of office, and for the suppression of familiarity.'[4]

[1] Sketches and Essays of Public Characters, by Francis W. Gilmer.
[2] Discourse on Marshall, p. 70.
[3] Ibid.
[4] Eulogy on John Marshall, p. 58.

He never evaded, nor attempted to evade the force of an opposing argument. He met it fairly, gave it its due weight, and then exposed its fallacy, or inapplicability, with irresistible cogency. 'Perhaps no judge ever excelled him in the capacity to hold a legal proposition before the eyes of others in such various forms and colors. It seemed a pleasure to him to cast the darkest shades of objection over it, that he might show how they could be dissipated by a single glance of light. He would, by the most subtle analysis, resolve every argument into its ultimate principles, and then, with a marvellous facility, apply them to the decision of the cause.'[1]

It has been remarked, that no judge ever profited more from argument; and it is not, perhaps, diverging into the circle of exaggeration, to say, that no Bar was ever more capable of aiding the mind of the Bench, than the Bar of the Supreme Court, in the time of Chief Justice Marshall.

Massachusetts was there represented by Dexter, a man of original power, who brought to the discussions of the forum something more than the learning of the lawyer; a comprehension that grasped the very foundations of all law, and a force of argument and illustration that riveted all minds;[2] and Webster, eminent for his powers of argument and eloquence, learned in

[1] Story's Discourse, p. 69.

[2] Mr. Dexter depended much more upon the suggestions and deductions of his own mind than upon the learning of the books. It has been said, that he 'often found himself sustained by the authority of a Scott or a Mansfield, when he was not aware that he was treading in the footsteps of those great jurists.' He was, undoubtedly, one of the ablest advocates that has ever appeared at the American Bar.

the principles of the common law, strong, compact, and massive.[1]

New York sent there, along with Hoffman, Wells, and Ogden,—Emmett and Oakly; the one possessing a mind of great activity, vigor, and resource, and a heart full of the springs of an affecting eloquence; and the other, with an intellect so naturally logical, and so adapted to reasoning upon legal subjects, that, without the aid of profound learning, he rose to a high grade of distinction as a lawyer, and discharged the duties of Chief Justice of New York with an ability that adorned even the seat that had been so long and eminently filled by a Kent.

Pennsylvania supplied a Tilghman, 'strong, clear, pointed, and logical;'[2] a Rawle, precise, perspicuous, and accurate, but with a mind better adapted, perhaps, to explore the niceties of the law than firmly to grasp its more enlarged principles; an Ingersoll, learned and laborious, but diffuse and tedious; a Duponceau, diligent, acute, and ingenious; a Hopkinson, an able lawyer, and a man of liberal principles and culture; a Sergeant, distinguished for the vigor and grasp of his mind; together with Horace Binney whose learning and abilities were universally acknowledged.

Maryland asserted a high, and, probably, a pre-eminent place at that Bar, in the persons of Luther Martin, William Pinkney, and Robert G. Harper. Jefferson termed the former, during the progress of Burr's

[1] A very comprehensive and candid estimate of 'Daniel Webster as a jurist,' will be found in a pamphlet, under that title, which contains an Address to the Law Students at Cambridge, by the Hon. Joel Parker, LL.D.

[2] Judge Story. See also a notice of Tilghman, by Judge Duncan, in Lyle *v.* Richards, in Sergeant & Rawle's Reports, vol. ix.

trial, 'an impudent Federal bull-dog,' a description suggestive of the pluck, vigor, and strength, that distinguished him. Nature had given him a mind of great force; and deep study had stored it with profound learning. His uncommon powers, however, were not always at command, and, before he could concentrate them upon his objects, he was desultory, wandering, and inaccurate.

Pinkney was vain, artificial, arrogant, and overbearing; but, in those qualities that constitute the great lawyer and advocate, he was unequalled, certainly not surpassed by any of his cotemporaries. His talents, powerful from nature, and cultivated by learning, were stimulated and excited by an ambition that never paused in the pursuit of professional fame. Chief Justice Marshall said, that he never knew his equal as a reasoner — so clear and luminous was his method of argumentation.[1] With a harsh and feeble voice, with a manner vehement, nay, almost boisterous; 'yet, notwithstanding these defects,' says Judge Story, 'such is his strong and cogent logic, his elegant and perspicuous language, his flowing graces, and rhetorical touches, his pointed and persevering arguments, that he enchants, interests, and almost irresistibly leads away the understanding.'[2]

Harper was an able lawyer, a graceful orator, and united, in his forensic efforts, argument and eloquence with admirable felicity.

Virginia furnished fit representatives of her genius in Wickham, Leigh, Nicholas, and the buoyant and gifted Wirt, who combined, not, perhaps, in exact proportions, the great and the graceful, and enforced his

[1] Story's Life and Letters, vol. ii., p. 494.

[2] Ibid., vol. i., p. 217. Letter to Mrs. Story, March 5th, 1812.

carefully prepared arguments with an attractive and persuasive oratory.

These were the men, with others, among the living and the dead, who graced the Bar, and enlightened the wisdom of the Court over which presided Chief Justice Marshall. Assisted by their learning, their investigations, and arguments, his judicial career furnishes a series of closely reasoned decisions which stand, and will forever stand, enduring monuments of his intellectual power. His conclusions may not always command assent, but the force of his reasoning cannot fail to be felt. Several of these decisions, of a more interesting character, perhaps, than the others, though the ability they display is characteristic of them all, will now claim our attention. It should be observed, however, that it was more particularly in the department of constitutional law that the influence of Chief Justice Marshall, in the decisions of the Supreme Court, was most marked and observable. 'When it came to the exposition of the Constitution, his colleagues on the Bench, learned, able, and distinguished as they were, submitted to his superior wisdom, and the impress of his mind is indelibly stamped on their adjudications. His opinions as to the scope of that instrument, the extent of the powers conferred by it, and the ends contemplated by its framers, were not the growth of a day, nor formed after he came to the Bench. He had borne a part in the deliberations of the Virginia Convention; he had participated in the discussions that had shaken the halls of the Virginia Legislature respecting the rights of the States, as well as the rights and powers of the General Government; and his experience, studies, and reflection had led him to adopt what has been called the liberal interpretation of the Constitution; an interpretation which he

believed necessary to secure its benefits, and promote the intentions of its framers. Hence his decisions as a judge, in cases involving questions of constitutional law, were the natural fruit of the system of construction which he had previously and maturely adopted. What he thought of the opposing system may be seen from his opinion in the case of Gibbons *v.* Ogden.[1]

'This instrument,' said he, 'contains an enumeration of powers expressly granted by the people to their Government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the Constitution, which has been pointed out by the gentlemen of the Bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the Government those powers which the words of the grant, as usually understood,

[1] Wheaton, vol. ix., p. 187.

import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the Government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded.'

And again:—'Powerful and ingenious minds taking, as postulates, that the powers expressly granted to the Government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well-digested, but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case it is peculiarly necessary to recur to safe and fundamental principles, to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.'[1] '

'And, in his dissenting opinion in the case of Ogden *v.* Saunders,[2] the Chief Justice incidentally remarked upon the principles which he thought ought to be applied to to the construction of the Constitution. 'To say,' he observed, 'that the intention of the instru-

[1] Wheaton, vol. ix., p. 221

[2] Ibid., vol. xii., p. 332.

ment must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers — is to repeat what has been already said more at large, and is all that can be necessary.'

Before proceeding to notice the cases in which the principles, as thus explained, were applied to the interpretation of the Constitution, we shall invite the reader's attention to several of those criminal and prize causes which constitute marked features of Marshall's judicial career. Of the former class, the treason trials growing out of the enterprizes of Col. Burr will necessarily find a place here.

Aaron Burr, whether viewed in the worst or best aspects of his character, was an extraordinary man. He was distinguished as a soldier, and, if judged by the standard of success, had but few superiors as a lawyer. He was aptly termed 'the subtlest practitioner of the times.'[1] In public life he was remarked for his commanding dignity and impressive oratory; and, in private, for an ease and grace, and charm of manner, which won the regards of men, and dazzled and captivated women. 'He was brave, affable, munificent, of indomitable energy, of signal perseverance. In his own person, he combined two opposite natures. He was studious, but insinuating; dignified, yet seduc-

[1] His definition of law, however, namely, 'whatever is boldly asserted and plausibly maintained,' shows the estimate in which he held his profession, and the ethics he applied to its practice.

tive. Success did not intoxicate, nor reverse dismay him.'[1] On the other hand, he is represented as 'profligate in morals, public and private; selfish and artful; a master in dissimulation, treacherous, cold-hearted, subtle, intriguing, full of promise, a sceptic in honesty, a scorner of all things noble and good,' from whom the people shrank, 'in mistrust, as from a cold and glittering serpent.'[2]

Suspected, and separated, in great measure, from his own party, by reason of his contest with Jefferson, and anathematized by the other in consequence of his duel with Hamilton, Burr found himself, in the maturity of his years and talents, cut off, apparently, from the very source of political honors. Being thus debarred from a career, in his own country, that could give employment to his abilities, and scope to his ambition, he naturally looked abroad for an appropriate field of action. At this time, namely, in the spring of 1805, and at the close of his term as Vice-President of the United States, the imminence of war with Spain held out to him a prospect of power and aggrandizement.

It was well known that there was great dissatisfaction throughout Mexico with the mother country; that the priesthood were very generally disaffected, and ready to lend their powerful aid in throwing off the yoke of Spain, provided their privileges were asserted and secured. The times seemed eminently favorable for the prosecution of a successful enterprize against that country; an enterprize, it is stated, which, in the event of war, and as a means of inflicting a blow upon Spain, was favored by Mr. Jefferson. 'Burr saw the glittering prize, and resolved to seize it. He

[1] Safford's Life of Blennerhassett, p. 182. [2] Ibid.

would conquer this gorgeous realm, and realize, in this new world, as Napoleon did in the old, a dream of romance.'[1] That he also anticipated a separation of the Western from the Atlantic States, and hoped to profit by such an event, is probable; but that it constituted any part of his project to accomplish, or attempt to accomplish such separation, is very improbable. 'That a man of sense and ability should entertain such a notion, relying for aid on associates whom he knew would countenance no treason, is a preposterous and insane supposition. As he said on his death-bed, he might as well have attempted to seize the moon, and parcel it out among his followers.'[2] There are some circumstances, however, that seemingly justify the suspicion that he intended to avail himself of the discontents existing in the Mississippi and Louisiana territories, and, if the people were ready for such a movement, to detach them from the Union.

In the spring of 1805, he visited the Western country, with the view to make arrangements for the conquest of Mexico, and subordinately to engage in a land speculation. Through the summer and autumn of that year, everything seemed to favor his project. War with Spain appeared to be inevitable. The men of the West, under the impression that Burr's enterprise was favored by the Administration, were eager and impatient to enlist under his banner. But, in the winter of 1805–6, the idea of war with Spain, unless the United States were actually invaded, was abandoned by the Administration. Burr, therefore, no longer had the benefit of that pretext in prosecuting his designs; but, nevertheless, he pressed forward to their accomplishment. During his tour through the

[1] Safford's Life of Blennerhassett, p. 71. [2] Ibid., p. 182.

West, in 1805, he had an interview with General Wilkinson, who was then in command of the Western forces, and, without question, Wilkinson promised to co-operate with him. With the expectation of such powerful support, Burr prosecuted his arrangements with great vigor, and on the 29th of July, 1806, being then at Philadelphia, he despatched Samuel Swartwout to Wilkinson with a letter in *cypher;* a letter which, it is hardly conceivable, so cautious and astute a person would write, unless a previous understanding existed with the person to whom it was addressed. The letter, however, related to an enterprise against the Spanish territories, and had no necessary or natural reference to any other.

Trusting to Wilkinson's co-operation, Burr proceeded to the West in August, and commenced active preparations for his projected enterprise. Boats and stores of various kinds were collected, and an unusual number of strange faces made their appearance on the Ohio and its tributary waters. Rumors now began to circulate that these circumstances boded no good to the country; that a conspiracy had been set on foot to dismember the Union; and that designs were meditated which were masked from the public eye. Wilkinson, too, on receiving Burr's communication by Swartwout, proved, according to Burr, 'a perfidious villain.' He denounced the enterprise, and adopted very vigorous measures to defeat it. Burr's letter he forwarded to the President; arrested Swartwout, Bollman, and others, whom he refused to deliver to the civil authorities, and proceeded to erect works for the defence of New Orleans.

On the 27th of November, 1806, the President issued a proclamation against Burr's proceedings, and enjoined the arrest of all persons concerned in them.

The result was, that the expedition was broken up, and Burr arrested, while attempting to escape across the country to Pensacola, and sent under guard to Richmond, Virginia, for trial. Swartwout and Bollman had already been sent to Washington, where they were committed to prison on a charge of treason against the United States.

Their counsel moved the Supreme Court, then in session[1] at Washington, for a writ of *habeas corpus*, to bring them before that tribunal, that the cause of their commitment might be inquired into. This motion was granted. It was then moved that the prisoners be either discharged or admitted to bail.[2]

The evidence against Swartwout consisted chiefly of an affidavit made by General Wilkinson, which comprehended the substance of Burr's letter, of which we have seen Swartwout was the bearer, and also Swartwout's declarations to General Wilkinson.[3] The Court held that Burr's enterprise, as disclosed in his letter, related to a foreign power, and, consequently, was not treasonable; that Swartwout's declarations, even though they might show a treasonable intention, afforded no sufficient proof that there was an open assemblage of men to carry it into execution, without which the crime of treason had not been consummated;

[1] February term, 1807. [2] Cranch, vol. iv., pp. 75–137.

[3] Swartwout, on an inquiry from Wilkinson, said, 'This territory, (meaning, probably, the Louisiana territory, though this is not altogether clear,) 'would be revolutionized where the people were ready to join them, and that there would be some seizing, he supposed, at New Orleans.' He also stated that 'Col. Burr, with the support of a powerful association extending from New York to New Orleans, was levying an armed body of seven thousand men from the State of New York and the Western States and territories, with a view to carry an expedition to the Mexican territories.'

and, consequently, that he could not be held on that charge. Against Bollman there was no evidence, whatever, to support a charge of treason, and he was likewise discharged.

Marshall, *Chief Justice.* 'The specific charge brought against the prisoners is treason in levying war against the United States.' 'To constitute that specific crime for which the prisoners now before the Court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert, by force, the Government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed.' 'It is not the intention of the Court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war.' 'The application of these general principles to the particular case before the Court will depend on the testimony which has been exhibited against the accused.' 'Although, in making a commitment, the magistrate does not decide on the guilt of the prisoner, yet he does decide on the probable cause, and a long and painful imprisonment may be the consequence of

his decision. This probable cause, therefore, ought to be proved by testimony in itself legal, and which, though, from the nature of the case, it must be *ex parte*, ought, in most other respects, to be such as a court and jury might hear.'

Marshall held the May term of the Circuit Court for the district of Virginia, at which indictments were found against Burr and others for treason, and misdemeanor. The proceedings on the trial, the various motions that were made, and the various discussions that took place, were minutely reported, and subsequently published in two large volumes. We shall reproduce here, however, only the points that proved decisive of the cause. The trial, in every respect, was an interesting one. The nature of the charge against the prisoner, his acknowledged talents, and the high positions he had hitherto held, the number and eminence of the counsel employed, as well as the consequences involved, excited an extraordinary interest in the community. The indictments were brought in by the grand jury on the 24th of June, and the trial was then postponed until the 3d of August.

On that day the Court again assembled; but it was not until the 17th of the month that a jury was obtained, so general were the prepossessions against the prisoner and his cause. But, however strongly the current had set against him elsewhere, he could confidently rely on the Court for impartiality and candor; for a firm and faithful administration of the law, uninfluenced by the wishes of the Government, and unawed by popular clamor. Burr knew this, and, as the private memoranda of Blennerhassett show, strongly expressed it.

'Burr did not,' says Blennerhassett, 'infer that Chief J. will, on the present occasion, shrink from his duty, as an able judge or a virtuous patriot, to avert the revenge of an unprincipled Government, or avoid other trials menaced and preparing for himself, by its wretched partizans. . . . I am certain, whatever insects may have sought the judge's robes, whilst off his back, none will venture to appear upon the ermine which bedecks his person.'[1]

'Burr's forensic army' consisted of Edmund Randolph, John Wickham, Benjamin Botts, John Baker, Luther Martin, and Charles Lee, the late Attorney-General of the United States. Burr, too, was a host in himself, and discovered great acumen and ability in conducting his defence. 'The vivacity of his wits,' says Blennerhassett, 'and the exercise of his proper talents, now constantly solicited here, in private and public exhibition, . . . display him, to the eager eyes of the multitude, like a favorite gladiator, measuring over the arena of his fame, with firm step and manly grace, the pledges of easy victory.'[2] The Government was represented by George Hay, Alexander M'Rae, and William Wirt.

The indictment contained two counts; one charging that the prisoner, with a number of persons unknown, levied war on Blennerhassett's island, in Wood County, Virginia; and the other adding the circumstance of their proceeding from that island down the river, for the purpose of seizing New Orleans by force. The testimony adduced by the prosecution to prove the overt act laid in the indictment, showed, and the prosecuting

[1] 'Private Memoranda' of Blennerhassett, kept while confined at Richmond. American Review for 1845, p. 146.

[2] Davis's Life of Burr, vol. ii., p. 393

Attorney admitted, that Burr was not present when the alleged act was committed. The defence, therefore, insisted that any testimony that connected him with those who committed the overt act was irrelevant, because, conformably to the Constitution of the United States, no man can be convicted of treason who was not present when the war was levied; and because, even if it were otherwise, no testimony could be received, to charge one man with the overt acts of others, until those overt acts, as laid in the indictment, be proved to the satisfaction of the Court. Besides, it was contended that the indictment, having charged the prisoner with levying war on Blennerhassett's island, and containing no other overt act, could not be supported by proof that war was levied at that place by other persons, in his absence, even though he was connected with such persons in one common treasonable conspiracy; but, even if this were not the case, the previous conviction of some person who committed the act, supposed to constitute a levying of war, was indispensable to the conviction of a person who advised or procured such act. On the part of the prosecution it was contended that, although the accused was not actually present with the party assembled at Blennerhassett's island, he was yet legally present, and, therefore, might properly be charged in the indictment as being present in fact. And the opinion of the Court in *ex parte* Bollman and Swartwout was relied upon to sustain this position. The questions thus presented to the Court were most important; for, if the testimony objected to was arrested, the prosecution was at an end. 'The discussions at the Bar lasted a week, and 'a degree of eloquence seldom displayed on any occasion embellished a solidity of argument, and a depth of research,' which the Chief Justice gracefully acknowl-

edged had greatly aided him in the opinion he delivered. He knew and appreciated the responsibility that rested upon him. He knew that a decision favorable to the prisoner would subject him to the severest criticisms; that his motives would be impeached; that the press would assail him; and that the public mind, excited and prejudiced, was liable to be poisoned and misled. But the fear of consequences did not for a moment influence him.

'That this Court,' said he, 'dares not usurp power is most true. That this Court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case; if there is no alternative presented to him but a derilection of duty, or the opprobrium of those who are denominated the world, he merits the contempt, as well as the indignation of his country, who can hesitate which to embrace.'

As the prosecution relied on the opinion in *ex parte* Bollman and Swartwout, to sustain the positions they had assumed, the Chief Justice entered into an explanation of the general expressions employed by the Court in that case, in order to show that they did not warrant the interpretation which had been put upon them. In that case, the Court had said, 'if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting, by force, a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.' But, as the

Chief Justice remarked, this opinion did not touch the case of a person who advised or procured an assemblage, and did nothing further. It had reference to the person who performs a part in the actual levying of war; and this part, however minute or remote, constitutes the overt act on which alone the person who performs it can be convicted. He must be indicted for the part actually performed by him, and not for a part which was, in truth, performed by others. If, therefore, the assemblage on Blennerhassett's island, was an assemblage in force, was a military assemblage in a condition to make war,[1] and having a treasonable object, it was, in fact, a levying of war, and, consequently, treason. But, as the accused was not present, and performing a part, as charged, evidence of his acts elsewhere was irrelevant. In other words, the indictment charged him with actually levying war on Blennerhassett's island, and, therefore, could not be supported by evidence which showed that he was actually absent from the scene of action. In short, that the Government could not state one case, and prove a very different one; or charge the prisoner with aiding in one transaction, and prove him to be actually employed in another. If the prisoner advised, procured, or commanded the treasonable act, though this might not

[1] Marshall, *Chief Justice.* 'An assemblage to constitute an actual levying of war, should be an assemblage with such force as would justify the opinion that they met for the purpose.' 'Why is an assemblage absolutely required? Is it not to judge, in some measure, of the end by the proportion which the means bear to the end? Why is it that a single armed individual, entering a boat and sailing down the Ohio, for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war, before it can amount to levying war?'

amount to treason, under the Constitution of the United States, yet the indictment should have charged him with what he actually did, and the evidence should conform to the charge.

Marshall, *Chief Justice.* 'The whole treason laid in this indictment is the levying of war on Blennerhassett's island, and the whole question to which the inquiry of the Court is now directed is, whether the prisoner was legally present at that fact. I say this is the whole question, because the prisoner can only be convicted on the overt act laid in the indictment. With respect to this prosecution, it is as if no other overt act existed. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged; it is as evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact.' 'It is, then, the opinion of the Court that this indictment can be supported only by testimony which proves the accused to have been actually or constructively[1] present when the assemblage took place on Blennerhassett's island, or by the admission of the doctrine that he who procures an act may be indicted as having performed that act. It is, further, the opinion of the Court that there is no testimony whatever which tends to prove that the accused was actually or constructively present when that assemblage did take place. Indeed, the contrary is most apparent. With respect to admitting proof of procure-

[1] If the accused, though he had not arrived in the island, had taken a position near enough to co-operate with those on the island, to assist them in any act of hostility, or to aid them if attacked, he, then, might have been *constructively* present, and this would have been a mixed question of law and fact, for the jury, with the aid of the Court, to decide.

ment to establish a charge of actual presence, the Court is of opinion that, if this be admissible in England on an indictment for levying war, which is far from being conceded, it is admissible only by virtue of the operation of the common law upon the statute, and, therefore, is not admissible in this country unless by virtue of a similar operation; a point far from being established, but on which, for the present, no opinion is given. If however, this point be established, still the procurement must be proved in the same manner, and by the same kind of testimony, which would be required to prove actual presence.' 'If those who perpetrated the fact be not traitors, he who advised the fact cannot be a traitor. . . . His guilt, therefore, depends on theirs, and their guilt cannot be legally established in a prosecution against him.' 'Now an assemblage on Blennerhassett's island is proved by the requisite number of witnesses, and the Court might submit it to the jury, whether that assemblage amounted to a levying of war; but the presence of the accused at that assemblage being nowhere alleged, except in the indictment, the overt act is not proved by a single witness, and, of consequence, all other testimony must be irrelevant.'

The jury having heard the opinion of the Court on the law of the case, brought in a verdict of 'Not Guilty.' On the 9th of September, Burr was again arraigned, upon an indictment for a misdemeanor; but the evidence failed to support the charge, and again the verdict of the jury was 'not guilty.'

The published correspondence of Jefferson shows how keen was his disappointment at the result of these prosecutions, and how warm his resentment against the Chief Justice, to whom he deemed that result was

attributable. 'Federalism in the Judiciary Department'[1] had always been a subject of annoyance to the President, and the acquittal of Burr was not likely to mollify the sentiment. At the next session of Congress his personal friend, and one of the warmest among the supporters of his Administration, namely, Mr. Giles, introduced a bill into the Senate to define treason. He made a speech in support of it, and 'attacked Chief Justice Marshall with insidious warmth.' Amongst other things he said, 'I have learned that judicial opinions on this subject are like changeable silks, which vary their colors as they are held up in political sunshine.'[2] It is easier, however, to impute motives than to answer arguments; and as neither the reasoning of the Chief Justice, nor the conclusions to which it led, have yet been refuted, we may safely conclude that the principles by which he was guided were entirely correct.

Having failed to convict Burr upon either of the indictments, the prosecution now moved to commit him for trial in Ohio; and, after hearing the arguments of the respective parties, the Chief Justice finally held him to bail in the sum of three thousand dollars to answer in that State for a misdemeanor, in setting on foot a military expedition against the Spanish territories. This decision, naturally enough, was very annoying to Burr, and he commented upon it with no little bitterness. 'I found Burr,' says Blennerhassett, before the decision was pronounced, but when it had been foreshadowed, 'after a consultation with his counsel,

[1] Jefferson's Works, vol. v., p. 63. Letter to Bowdoin, April 2d, 1807. See also his letters to George Hay during the progress of the trial, and at its conclusion, in the same volume.

[2] Story's Letters, vol. i., p. 157. Letter to Fay, February 13th, 1808.

secretly writhing under much irritation at the conduct of Judge Marshall, but affecting an air of contempt for his alleged inconsistencies, as Burr asserted he [the Judge] did not, for the last two days, understand either the questions or himself; that he had wavered in his opinions before yesterday's adjournment, and should, in future, be put right by *strong language*. I am afraid to say *abuse*, though I think I could swear to that word.'[1] As the Chief Justice was not 'put right,' according to Burr's conception of that phrase, we might safely conclude, even in the absence of any proof as to the propriety of his conduct, that he did not employ the 'strong language' which he threatened. To his daughter he wrote, that 'the opinion was a matter of regret and surprise to the friends of the Chief Justice, and of ridicule to his enemies; all believing that it was a sacrifice of principle to conciliate Jack Cade.'[2] If the decision was a proper one, if it was legal, even though the firmness and integrity of the Chief Justice were unknown to us, we might justly infer that it proceeded from good motives; and upon the question of law, the opinion of the Chief Justice will have more weight, perhaps, than the opinion of Col. Burr.

It would be impossible, and, if possible, improper, in a work of this character, to go into an examination of the multitude of prize, commercial, insurance, patent, and land cases that were pronounced upon by the Supreme Court in the time of Chief Justice Marshall. We shall only venture to select from them one or two prize cases, which will be more likely, perhaps, than others, to interest the reader. All the leading doctrines

[1] Davis's Burr, vol. ii., p. 397. September 20th, 1807.
[2] Ibid., p. 411. October 23d, 1807.

of prize law were discussed and confirmed by the Court, and its decisions on this subject constitute an elaborate and imperishable code. Among the more celebrated judgments of the Chief Justice, in this branch of the law, may be mentioned Rose *v.* Himely;[1] the Exchange,[2] in which it was held that the capture of an American vessel, and her subsequent commission in the service of the capturing Power, stamped her with the character of foreign nationality, and that the American owner must look to his Government for redress; the vessel in such a case, though coming within the territorial jurisdiction of the American courts, not being amenable to judicial process; and the Nereide,[3] which involved the question whether a hostile force added to a hostile flag infects with a hostile character the goods of a friend. The facts in the latter case were as follows: —

The Nereide, a British vessel, mounting sixteen guns, was hired by Manuel Pinto, a merchant of Buenos Ayres, to transport a cargo belonging to himself and some of his countrymen from London to Buenos Ayres. On her passage she was captured by an American privateer, brought into the port of New York, and both vessel and cargo condemned as lawful prize. From this decree Mr. Pinto appealed to the Supreme Court. He was there represented by Emmett and Hoffman; the captors by Pinkney and Dallas. Emmett and Pinkney were the opposing champions who attracted most attention, and whose efforts elicited most applause. Their arguments were among the best displays of their forensic abilities.

[1] Cranch, vol. iv., p. 241. [2] Ibid., vol. vii., p. 116.

[3] Ibid., vol. ix., p. 430. Compare with this case the decision of Lord Stowell in Dodson's Adm. Rep., vol. i., p. 443. See also The Atalanta, in Wheaton's Reports, vol. iii., p. 409

Of course it was conceded that the goods of a neutral on board an unarmed enemy vessel were exempt from condemnation as prize; but it was contended that the neutral character was forfeited, if they were placed on board an armed enemy vessel, inasmuch as the neutral thereby set in motion an agent of hostility. If it were otherwise, if the contrary idea were personified, said Pinkney, 'we shall have neutrality, soft and gentle, and defenceless in herself, yet clad in the panoply of her warlike neighbors, with the frown of defiance upon her brow, and the smile of conciliation upon her lip; with the spear of Achilles in one hand, and a lying protestation of innocence and helplessness enfolded in the other. Nay, if I may be allowed so bold a figure in a mere legal discussion, we shall have the branch of olive entwined around the bolt of Jove, and neutrality in the act of hurling the latter under the deceitful cover of the former.'

'Call you that neutrality which thus conceals beneath its appropriate vestments the giant limbs of war and converts the charter-party of the counting-house into a commission of marque and reprisals, which makes of neutral trade a laboratory of belligerent annoyance; which, with a perverse and pernicious industry, warms a torpid serpent into life, and places it beneath the footsteps of a friend with a more appalling lustre on its crest, and added venom in its sting; which, for its selfish purposes, feeds the fire of international discord, which it should rather labor to extinguish, and, in a contest between the feeble and the strong, enhances those inequalities that give encouragement to ambition, and triumph to injustice?'[1]

But the Court viewed the subject in a different light.

[1] Wheaton's Life of Pinkney.

Marshall, *Chief Justice.* 'The Nereide was armed, governed, and conducted by belligerents. With her force, or her conduct, the neutral shippers had no concern; they deposited their goods on board the vessel, and stipulated for their direct transportation to Buenos Ayres. It is true that, on her passage, she had a right to defend herself, and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter-party and of her duty.

'With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn, exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this Bench, to discover its only imperfection — its want of resemblance.

'The Nereide has not that centaur-like appearance which has been ascribed to her. She does not rove over the ocean, hurling the thunders of war, while sheltered by the olive-branch of peace. She is not composed in part of the neutral character of Mr. Pinto, and in part of the hostile character of her owner. She is an open and declared belligerent; claiming all the rights, and subject to all the dangers of the belligerent character. She conveys neutral property which does not engage in her warlike equipments, or in any employment she may make of them; which is put on board solely for the purpose of transportation, and which encounters the hazard incident to its situation— the hazard of being taken into port, and obliged to seek another conveyance, should its carrier be captured. In this, it is the opinion of the majority of the

Court, there is nothing unlawful. The character of the vessel and the cargo remain as distinct in this as in any other case.'

Marbury *v.* Madison[1] was the first case involving a constitutional question of any importance, that came before Chief Justice Marshall. The facts of the case were these: — Mr. Adams, before the expiration of his term of office, nominated Marbury to the Senate as Justice of the Peace for the District of Columbia, and the Senate approved the nomination. A commission was then drawn up, signed by the President, and sealed with the seal of the United States; but it had not been delivered when Mr. Jefferson succeeded to the Presidency. He, thinking the appointment incomplete until delivery of the commission, countermanded its delivery. A *mandamus* was then moved for, commanding Mr. Madison, the Secretary of State, to deliver it.

The interposition of the Court was invoked, on the ground that they were authorized by an act of Congress 'to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.' The first question, then, that naturally presented itself was, whether the authority thus given to the Supreme Court, to issue writs of mandamus to public officers, was warranted by the Constitution, and, if not, whether the Court was competent to declare the act void which conferred the authority; or, in other words, whether the Supreme Court possessed the power to declare void an act of Congress which they deemed repugnant to the Constitution? The order, however, in which the Court

[1] Cranch's Reports, vol. i., p. 158.

viewed the subject reversed the objects of inquiry. They first considered whether Marbury had a right to the commission which he claimed? And they decided that he had; that an appointment is complete when the commission is signed by the President; that the commission is complete when the seal of the United States has been affixed to it; and to withhold such commission from an officer not removable at the will of the Executive, is violating a vested legal right.

As the legality of his conduct, in directing the Secretary of State to withhold the commission from Marbury, was involved in this part of the decision, it was natural, perhaps, that Jefferson should be somewhat restive under the conclusions at which the Chief Justice arrived. His view of the matter was, that the validity of a commission, like that of a deed, depends on delivery; and as the Court held that they had no cognizance of the case, he considered their opinion as to the legality of Marbury's claim 'gratuitous,' 'an *obiter* dissertation of the Chief Justice,' and, at all events, a 'perversion of the law.'[1] Whether it be an irregular and censurable practice, as he termed it, for a court to express an opinion on the merits of a case in which they have no jurisdiction, they may, nevertheless, do it with very good motives, however those motives may be questioned. As to the real decision of the Court, namely, on the question of jurisdiction, and its power to declare void an unconstitutional act of Congress, the reasoning and conclusions of the Chief Justice have commanded universal assent.

Marshall, *Chief Justice.* 'The Constitution vests the whole political power of the United States in one

[1] Jefferson's Works, vol. vii., p. 290. Letter to Judge Johnson, June 12th, 1823. See also vol. v., p. 84.

Supreme Court, and such inferior Courts as Congress shall from time to time ordain and establish.' 'In the distribution of this power it is declared that "the Supreme Court shall have original jurisdiction in all cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be a party. In all other cases the Supreme Court shall have appellate jurisdiction.' 'To enable this Court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.' 'It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to Courts, yet to issue such a writ to an officer for the delivery of a paper is, in effect, the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary, in such a case as this, to enable the Court to exercise its appellate jurisdiction. The authority, therefore, given to the Supreme Court, by the act establishing the Judicial Courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

'The question, whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest.' 'If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute

a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or, conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.'

As in the case of Marbury *v.* Madison, the Supreme Court declared void an act of Congress which they deemed repugnant to the Constitution, so in the case of Fletcher *v.* Peck,[1] they declared void, for the same reason, an act of a State Legislature.[2] The Legislature of Georgia passed an act authorizing a patent to issue, granting a tract of land within the limits of that State. After the patent had been granted, a succeeding Legislature repealed the act which authorized it. It was contended that the original act was repugnant to the Constitution of Georgia; that the Legislature which

[1] Cranch's Reports, vol. vi. p. 87.

[2] This was also done in twenty-six subsequent instances.

passed it was corrupted; and that one Legislature cannot restrain a succeeding Legislature from repealing its acts.

Marshall, *Chief Justice.* 'The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.' In this case the Court can perceive no such opposition. In the Constitution of Georgia, adopted in the year 1789, the Court can perceive no restriction on the Legislative powers which inhibits the passage of the act of 1795. The Court cannot say that, in passing that act, the Legislature has transcended its powers and violated the Constitution.'

'The case, as made out in the pleadings, is simply this. An individual who holds lands in the State of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns as a breach that some of the members of the Legislature were induced to vote in favor of the law which constituted the contract, by being promised an interest in it; and that, therefore, the act is a mere nullity. This solemn question cannot be brought thus col-

laterally and incidentally before the Court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a Legislative act which the Legislature might constitutionally pass, if the act be clothed with all the requisite forms of law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another, founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the Legislature which passed the law.'

'The principle asserted is, that one Legislature is competent to repeal any act which a former Legislature was competent to pass, and that one Legislature cannot abridge the powers of a succeeding Legislature. The correctness of this principle, so far as it respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding Legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights.' 'The validity of this rescinding act, then, might be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose Legislature no other restrictions are imposed than may be found in its own Constitution. She is a part of a large empire; she is a member of the American Union; and that Union

has a Constitution, the supremacy of which all acknowledge, and which imposes limits to the Legislatures of the several States, which none claim a right to pass. The Constitution of the United States declares that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

'Does the case now under consideration come within this prohibitory section of the Constitution? In considering this very interesting question we immediately ask ourselves, What is a contract? Is a grant a contract?' 'A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.' 'If, under a fair construction of the Constitution, grants are comprehended under the term "contracts," is a grant from a State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description.' 'Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the Legislature the power of seizing, for public use, the estate of an individual, in the form of a law annulling the title in which he holds that estate? The Court can perceive no sufficient grounds for making this distinction.'

The case of Dartmouth College,[1] from some accidental circumstances connected with it, and from the importance of the principle which it established, namely, that a grant of corporate powers is a contract, the obligation of which the States are inhibited to impair, attracted great attention at the time, and has lost but little of its interest since.

The facts of the case were as follows: — A charter was granted to Dartmouth College, in 1769, by the Crown, on the representation that property would be given the College, if chartered; and, after the charter was granted, property was actually given. In 1816, the Legislature of New Hampshire passed three acts, amending the charter, which amendment the trustees would not accept. They invoked the aid of the State Courts; but judgment being given against them, they carried their case to the Supreme Court. There they were represented by Mr. Hopkinson and Mr. Webster; and the other side by Mr. Wirt, then Attorney-General of the United States, and Mr. Holmes.

The chief interest of the argument consisted in the speeches of Webster and Wirt. The former had argued the case in the State Courts, was familiar with the whole field of controversy, was a graduate of the College, and his feelings as a man combined with his ambition as an advocate to urge him to the utmost exertion of his powers. He addressed the Court for more than four hours, in an argument marked by his usual characteristics — clearness of statement, force and precision of reasoning.

'The argument ended,' says an eye-witness,[2] 'Mr.

[1] Wheaton, vol. iv., p. 518.

[2] Prof. Goodrich, of Yale College. Vide Choate's Eulogy on Webster

Webster stood, for some moments, silent before the Court, while every eye was fixed intently upon him. At length, addressing the Chief Justice, Marshall, he proceeded thus: —

'This, Sir, is my case! It is the case not merely of that humble institution — it is the case of every college in our land. It is more. It is the case of every eleemosynary institution throughout our country — of all those great charities founded by the piety of our ancestry to alleviate human misery, and scatter blessings along the pathway of life. It is more! It is, in some sense, the case of every man among us, who has property of which he may be stripped; for the question is simply this: "Shall our State Legislatures be allowed to take that which is not their own, to turn it from its original use, and apply it to such ends or purposes as they, in their discretions, shall see fit?" Sir, you may destroy this little institution; it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do so, you must carry through your work. You must extinguish, one after another, all those great lights of science which, for more than a century, have thrown their radiance over our land! It is, Sir, as I have said, a small college. And yet there are those who love it. [Here the feelings which he had thus far succeeded in keeping down, broke forth; his lips quivered; his firm cheeks trembled with emotion; his eyes were filled with tears; his voice choked; and he seemed struggling to the utmost simply to gain that mastery over himself which might save him from an unmanly burst of feeling. I will not attempt to give you the few broken words of tenderness in which he went on to speak of his attachment to the college; the whole seemed to be mingled throughout with the

recollections of father, mother, brother, and all the trials and privations through which he had made his way into life. Every one saw that it was wholly unpremeditated, a pressure on his heart, which sought relief in words and tears.]

'The court-room, during these two or three minutes, presented an extraordinary spectacle. Chief Justice Marshall, with his tall and gaunt figure bent over, as if to catch the slightest whisper, the deep furrows of his cheek expanded with emotion, and eyes suffused with tears; Mr. Justice Washington, at his side, with his small and emaciated frame, and a countenance more like marble than I ever saw on any other human being, leaning forward with an eager, troubled look; and the remainder of the Court, at the two extremities, pressing, as it were, towards a single point, while the audience below were wrapping themselves around in closer folds beneath the bench, to catch every look and every movement of the Speaker's face. If a painter could give us the scene on canvass — those forms and countenances, and Daniel Webster as he then stood — it would be one of the most touching pictures in the history of eloquence.' 'Mr. Webster had now recovered his composure, and, fixing his keen eye on the Chief Justice, said, in that deep tone with which he sometimes thrilled the heart of an audience: —

'Sir, I know not how others may feel,' (glancing at the opponents of the college before him,) 'but, for myself, when I see my *alma mater* surrounded, like Cæsar in the Senate House, by those who are reiterating stab upon stab, I would not, for this right hand, have her turn to me and say, "*et tu quoque mi fili.*" And thou, too, my son! He sat down. There was a death-like stillness throughout the room for some moments; every one seemed to be slowly recovering

himself, and coming gradually back to his ordinary range of thought and feeling.'

The argument of Mr. Wirt in support of the acts of the Legislature amendatory of the College charter, though overshadowed by Mr. Webster's, 'was a full, able, and most eloquent exposition of the rights of the defendant.'[1]

The opinion of the Court was delivered by

Marshall, *Chief Justice.* 'This is plainly a contract, to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal estate has been conveyed to the corporation. It is, then, a con-

[1] Webster to Wirt. Kennedy's Wirt, vol. ii., p. 82. It detracts somewhat from the value of Mr. Webster's commendation, when we find him, at the same time, writing thus to his friend, Jeremiah Mason: — 'Wirt followed. He is a good deal of a lawyer, and has very quick perceptions, and handsome power of argument; but he seemed to treat this case as if his side could furnish nothing but declamation.' Private Correspondence, vol. i., p. 275. March 13th, 1818.

Again, in writing to Chief Justice Smith, he says: — 'Wirt has talents, is a competent lawyer, and argues a good cause well. In this case he said more nonsensical things than became him.' Ibid., p. 276. March 14th, 1818.

Nevertheless, and notwithstanding Mr. Pinkney, who desired to have the argument reopened, in order that he might address the Court in support of the assumed right of the State to amend the College charter, declared that Wirt's back was not strong enough for such a case, his argument must be considered as one of very great merit.

tract within the letter of the Constitution, and within its spirit, also, unless the fact, that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution. . . . On what safe and intelligible ground can this exception stand? There is no expression in the Constitution, no sentiment delivered by its cotemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the Constitution not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the Constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to Legislative alteration, as to compel us, or rather permit us, to say that these words, which were introduced to give stability to contracts, and which, in their plain import, comprehend this contract, must yet be so construed as to exclude it?'

An examination of the subject induces a negative answer to these queries; and, hence, the opinion of the Court being, that the charter constituted a contract, whose obligation had been impaired by the Legislature of New Hampshire, it followed that the action of the Legislature was repugnant to the Constitution of the United States, and consequently void.

At the same term of the Court that the case of Dartmouth College was argued, was also argued the

case of M'Culloch *v.* The State of Maryland.[1] It involved the question as to the constitutionality of the act incorporating the Bank of the United States. It had been a vexed question from the foundation of the Government. The opponents of the Bank insisted that no clause of the Constitution authorized Congress to create a corporation; that, though they were empowered to make all laws 'necessary and proper' to carry into effect the powers conferred on the Government, yet such laws were only 'necessary and proper,' as were absolutely indispensable, and without which the powers conferred would be nugatory. On the other hand, it was contended, that, to carry on its operations, the Government must employ persons, and that their acting in an artificial capacity was not material, as the Government must be authorized to exercise a discretion in the choice of agents, and that the power to make all 'necessary and proper' laws to carry into execution the enumerated powers, did not restrict Congress to the passage of only such laws as were *absolutely* necessary, but to such as were 'necessary' in the ordinary and usual meaning of the word. The case presented for the decision of the Court arose as follows: —

In April, 1816, Congress incorporated the Bank of the United States. In 1817, a branch of this Bank was placed at Baltimore, Maryland. In 1818, the Legislature of Maryland passed a law to tax all banks, or branches thereof, located in that State, and not chartered by its Legislature. The branch Bank refused to pay this tax, and M'Culloch, the cashier, was sued for it. Judgment being given against him in the Maryland Courts, he carried it before the Supreme

[1] Wheaton, vol. iv., p. 316.

Court. Naturally enough, the decision of this tribunal was looked for with eager interest.

The counsel employed on either side were of the highest professional eminence. Pinkney, Wirt, and Webster appeared for the Bank; and Martin, Hopkinson, and Jones for the State. Pinkney shone, on this occasion, with unrivalled splendor. He made the closing argument. 'I never, in my whole life,' says Judge Story, 'heard a greater speech. It was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments, were most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about State rights and State sovereignty, he brushed away as with a mighty besom. . . . . Mr. Pinkney possesses, beyond any man I ever saw, the power of elegant and illustrative amplification.'[1]

The opinion of the Court was, that the act incorporating the Bank was constitutional; that the Bank might properly establish a branch in the State of Maryland; and that Maryland could not, without violating the Constitution, tax that branch.

Marshall, *Chief Justice.* 'Although, among the enumerated powers of Government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are

[1] Story's Life and Letters, vol. i., p. 325. Story to White, March 3d, 1819.

entrusted to its government.' 'The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast Republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. . . . Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means?' 'The Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves to prove the exception. . . . But the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department thereof." To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which

the end would be entirely unattainable. . . . The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.' 'If the word *necessary* means *needful, essential, requisite, conducive to*, in order to let in the power of punishment for the infraction of law,[1] why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?'

Having thus arrived at the conclusion that the creation of a bank is warranted by the Constitution, the Chief Justice proceeds to inquire whether it or its branches may be taxed by the States.

'That the power to tax,' said he, 'involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.' 'If the

[1] As in the case of the power 'to establish post-offices and post-roads.' From this has been inferred, without question or denial, the power to carry the mail along the post-road, from one post-office to another; and from this *inferred* power has again been *inferred* the right to punish those who steal letters from the post-office, or rob the mail.

States may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the Government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their Government dependent on the States.[1]

In the case of Cohens *v.* State of Virginia,[2] two very important questions were presented for adjudication, namely, whether the Court could exercise jurisdiction, one of the parties being a State, and the other a citizen of that State; and, secondly, whether, in the exercise of its appellate jurisdiction, it could revise the judgment of a State Court, in a case arising under the Constitution, laws, and treaties of the United States. The Court held that it had jurisdiction in both instances.

The facts involved in the case were these: — An act of Congress authorized the city of Washington to establish a lottery, and, by virtue of the act, the lottery was established. Cohen was indicted, at Norfolk, Virginia, for selling tickets of this lottery, contrary to a law of Virginia, prohibiting such sale. In the State Court, he claimed the protection of the act of Congress under which the lottery was established; but judgment being given against him, he sued out a writ of error to

[1] Weston *v.* City of Charleston (Peters, vol. ii., p. 449) was decided on similar principles; the Court holding that stock issued for loans to the Government cannot be taxed by States and corporations.

[2] Wheaton, vol. vi., p. 264.

the Supreme Court of the United States. There the judgment of the State Court was sustained; it being held that the lottery law did not control the laws of the States prohibiting the sale of the tickets. The chief interest of the case, however, depended on the question, whether the Supreme Court could take cognizance of it. And it is with reference to that point that the opinion of the Court is quoted.

Marshall, *Chief Justice.* 'It [the Supreme Court] is authorized to decide all cases, of every description, arising under the Constitution or laws of the United States. From this general grant of jurisdiction no exception is made of those cases in which a State may be a party. When we consider the situation of the Government of the Union and of a State in relation to each other, the nature of our Constitution, the subordination of the State Governments to that Constitution, the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States is confided to the Judicial Department, are we at liberty to insert in this general grant an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. We think a case arising under the Constitution or laws of the United States is cognizable in the Courts of the Union, whoever may be the parties to that case.' 'The laws must be executed by individuals acting within the several States. If these individuals may be exposed to penalties, and if the Courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the Government may be, at any time, arrested by the will of one of its members. Each member will possess a veto on the will of the whole.'

'That the United States form, for many and for most important purposes, a single nation has not yet been denied.' 'These States are constituent parts of the United States. They are members of one great empire — for some purposes sovereign, for some purposes subordinate. In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the Legislature? That department can decide on the validity of the Constitution or law of a State, if it be repugnant to the Constitution or to a law of the United States Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the Constitution? We think not. . . . The exercise of the appellate power over those judgments of the State tribunals which may contravene the Constitution or laws of the United States is, we believe, essential to the attainment of those objects.'

In the case of Johnson *v.* M'Intosh,[1] the Court held, that the Indians have only a right of occupancy to their lands, and are incapable to convey a title to them in fee. The plaintiff claimed certain lands under a private purchase from the Indians; the defendant held under the United States.

Marshall, *Chief Justice.* 'We will not enter into the controversy, whether agriculturists, merchants, and manufacturers have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which

[1] Wheaton, vol. viii., p. 543.

the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.' 'However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.'

Gibbons *v.* Ogden[1] was a case of great celebrity, and involved considerations of the most important character. New York granted to Robert R. Livingston and Robert Fulton, for a term of years, the exclusive right to navigate the waters of that State with boats moved by steam. From them Ogden derived the right to use such boats in the waters between Elizabethtown, New Jersey, and the city of New York. Gibbons put two steamboats on that route, and claimed that he had a right to do so, inasmuch as his boats were regularly

[1] Wheaton, vol. ix., pp. 1–240.

licensed under the laws of Congress. The rights of the parties were litigated in the Courts of New York, and both the Court of Chancery and the Court of Errors sustained the validity of the State laws. Gibbons now brought his case before the Supreme Court of the United States. It had attracted universal attention, and the opinion of the tribunal of last resort was awaited with eager interest.

Webster and Wirt appeared for Gibbons, and Emmet and Oakly for Ogden. 'To-morrow begin my toils in the Supreme Court,' wrote Wirt to his friend Judge Carr, 'and about to-morrow week will come on the great steamboat question from New York. Emmet and Oakly on one side, Webster and myself on the other. Come down and hear it. Emmet's whole soul is in the cause, and he will stretch all his powers. Oakly is said to be one of the first logicians of the age; as much a Phocion as Emmet is a Themistocles; and Webster is as ambitious as Cæsar. He will not be outdone by any man, if it is within the compass of his power to avoid it. It will be a combat worth witnessing.'[1]

The argument on both sides was conducted with consummate ability, but to Mr. Webster belongs the credit of suggesting the ground which constituted the basis of the reasoning and conclusions of the Court. The proposition he maintained was, that Congress has the *exclusive* authority to regulate commerce in all its forms, on all the navigable waters of the United States, their bays, rivers, and harbors, without any monopoly, restraint, or interference created by State legislation. It is said that 'Mr. Webster having stated his positions to the Court, Judge Marshall laid down his pen,

[1] Kennedy's Wirt, vol. ii., p. 142. Letter to Carr, February 1st, 1824

turned up his coat-cuffs, dropped back upon his chair, and looked sharply upon him; that Mr. Webster continued to state his propositions in varied terms, until he saw his eyes sparkle, and his doubts giving way; that he then gave full scope to his argument; and that he never felt the occasion of putting forth his powers as when he was arguing a question before Judge Marshall.'[1]

Marshall, *Chief Justice.* 'The word [commerce] used in the Constitution comprehends, and has been always understood to comprehend, navigation, within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."[2] To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes." "It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it. The subject to which the power is most applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which

[1] 'Daniel Webster as a Jurist,' by Joel Parker, LL.D.

[2] See Marshall's opinion to the same effect in the case of the Brig Wilson, Brockenbrough's C. C. R., vol. i., p. 423.

is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one.'

'What is commerce "among" them? [the States,] and how is it to be conducted?' 'Commerce among the States must, of necessity, be commerce with the States. . . . The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States.' 'What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' 'It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the Court is not satisfied that it has been refuted. Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact

laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the Court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him.'

The result of the inquiry was, that the acts of New York were in collision with the act of Congress under which Gibbons derived his coasting license, and consequently, must yield to it; the Constitution and the laws made in pursuance of it being supreme.

In the case of Osborn *v.* The United States Bank,[1] among other questions presented for the decision of the Court was the very difficult one, whether, since the Constitution has exempted a State from the suits of citizens of other States, the Supreme Court may act upon the agents employed by the State, and on the property in their hands? Or, in other words, though the Court has no jurisdiction where the suit is against the State directly, has it such jurisdiction where the State, though not directly a party, is so indirectly, in consequence of her agents, acting by her order, and executing her mandates, being substituted in her place?

Marshall, *Chief Justice.* 'A denial of jurisdiction forbids an inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the Government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts

[1] Wheaton, vol. ix., p. 738.

that the agents of a State, alleging the authority of a law void in itself, because repugnant to the Constitution, may arrest the execution of any law of the United States. It maintains that, if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the Government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty may, indeed, resort to his action for damages, after the infliction of the injury, but cannot avail himself of the primitive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs; while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.'

'The question, then, is, whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist

the execution of those laws. The State of Ohio denies the existence of this power, and contends that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent of a State, can be sustained against such agent, because they would be substantially against the State itself, in violation of the eleventh amendment of the Constitution.' 'Do the provisions, then, of the American Constitution, respecting controversies to which a State may be a party, extend, on a fair construction of that instrument, to cases in which the State is not a party on the record?' 'It may, we think, be laid down, as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named on the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State by the citizens of another State, or by aliens.'

In the case of Brown *v.* The State of Maryland,[1] the interesting question came before the Court, whether a State can constitutionally require the importer of foreign articles to take out a license from the State, before being permitted to sell a bale or package so imported?

Marshall, *Chief Justice.* 'There is no difference, in effect, between a power to prohibit the sale of an arti-

[1] Wheaton, vol. xii., p. 419

cle and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported, if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by import, so far as it is drawn from importations into the particular State.' 'It is sufficient, for the present, to say, generally, that, when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.' 'It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a sister State. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.'[1]

[1] In connection with this case the reader will do well to read the cases of Thurlow *v.* Massachusetts; Fletcher *v.* Rhode Island; and Pierce *v.* New Hampshire; Howard's Reports, vol. v., p. 504.

In the case of Craig *v.* The State of Missouri,[1] an act of that State establishing loan offices, and authorizing the issue of certificates of stock, was declared void, as being repugnant to that clause of the Constitution which prohibits the States from emitting bills of credit.

Marshall, *Chief Justice.* 'What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates, signed by the auditor and treasurer of the State, are to be issued by those officers, to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents. The paper purports, on its face, to be receivable at the treasury, or at any loan office of the State of Missouri, in discharge of taxes or debts due to the State.' 'Had they been termed "bills of credit," instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the Constitution. And can this make any real difference? Is the proposition to be maintained, that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself.'[2]

[1] Peters' Reports, vol. iv., p. 411.

[2] Compare Byrne *v.* The State of Missouri, Peters' Rep., vol. viii., p. 40; and Briscoe *v.* The Bank of Kentucky, ibid., vol. xi., p. 257.

The case of The Cherokee Nation *v.* The State of Georgia,[1] which came before the Court at the January term, 1831, attracted universal attention, and was well calculated to enlist the sympathies of the American people in behalf of the unfortunate Indians, whose clear and undeniable rights had been wrested from them by Georgia, without reference to the obligations the Government of the United States owed to them, and without any other consideration than to get rid of them and possession of their lands. But, while the conduct of Georgia is without justification, when viewed solely with reference to the Indians, it must be admitted, we think, that there was much in the policy of the General Government to provoke it, as the following brief statement of the case will show.

By treaty with the Indians in 1791, the Government guaranteed to them their lands. By agreement with Georgia, in 1802, the Government, in consideration of the cession to the United States by Georgia of the territory now included within the limits of Alabama and Mississippi, undertook to extinguish the title of the Indians to their lands within the limits of Georgia, 'as soon as it could be done peaceably, and on reasonble terms.' The lands, moreover, were not to be taken from the Indians without their consent, and the utmost good faith was to be observed towards them. But the Government, though having the means to extinguish the Indian title, and bound to do it within a reasonable time, failed to do so. In 1817, it is true, one-half of the tribe were induced to remove; but it is believed that the whole nation might, at that time, have been persuaded to leave, had the Government used the appropriate means. Instead, however, of this being done,

[1] Peters' Reports, vol. v., pp. 1–80.

the policy of the Government tended directly to make the Indians permanent residents of the soil. They were encouraged to become civilized, and, under the influence of this encouragement, were happily becoming so. Cultivated farms, schools, and churches, were seen among them; — admirable instruments for their elevation, but calculated to attach them more strongly to the soil, and render them averse to removal. Georgia complained that the policy of the Government in thus civilizing the Indians, however beneficial to them, was inconsistent with the obligations it owed to her. And we cannot help thinking that there was force in this complaint.

In 1824, the Indians took a step which indicated very clearly that they never intended to leave their territory in Georgia for the wild hunting-grounds beyond the Mississippi. They formed and adopted a constitution for a permanent government. Great excitement thereupon ensued throughout Georgia, and the Legislature passed a series of laws which went directly to annihilate the Cherokees as a political society, and to seize their lands for the use of the State; lands which the United States had assured to them by the most solemn treaties. All this was flagrantly unjust to the Indians, who were innocent of any offence to Georgia, and were entitled, if they desired it, to hold their lands forever, and be governed by their own laws and regulations, as a distinct community. But, on applying to the Administration of General Jackson for aid in their troubles, they were told that the Government would not interfere. They then employed counsel, and a bill was brought before the Supreme Court, praying an injunction to restrain the State from the execution of the obnoxious laws. The State paid no attention to the proceeding, was not

represented at the hearing, and did not intend to respect an adverse decision. The argument on behalf of the Cherokees was conducted with uncommon ability and eloquence by Mr. Wirt, and John Sergeant of Philadelphia. The Court held, however, that they had no jurisdiction of the case.

Marshall, *Chief Justice.* 'If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts, and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their former extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.'

'Has this Court jurisdiction of the cause? The third article of the Constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" "between a State, or the citizens thereof, and foreign States, citizens, or subjects." A subsequent clause of the same section gives the Supreme Court original jurisdiction in all cases in which a State shall be a party. The party defendant may, then, unquestionably, be sued in this Court. May the plaintiff sue in it? Is the Cherokee nation a foreign State in the sense in which that term is used in the Constitution?'

'Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to

the lands they occupy, until that right shall be extinguished by a voluntary cession to our Government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.' 'They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.' 'The Court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation is not a foreign State in the sense of the Constitution, and cannot maintain an action in the Courts of the United States.'

One of the laws of Georgia relating to the Cherokees, prohibited any white person from residing within the limits of the Indian territory without a license from the Governor, and without taking an oath to support and defend the Constitution and laws of the State. This law was aimed at the missionaries residing among the Indians, and who were supposed to be inimical to the policy of Georgia with regard to them. Samuel A. Worcester, a citizen of Vermont, was one of these missionaries. He had been sent out in that capacity by the American Board of Foreign Missions, and with the sanction of the President of the United States. Refusing to comply with the law of Georgia, he and six others, who occupied the same position with himself, were arrested, tried, and convicted for its

violation, and each sentenced to four years' imprisonment at hard labor in the penitentiary. A pardon was then offered them on condition that, in the future, they would conform to the policy of the State. Five of the missionaries accepted the pardon; but Worcester, and another, the Rev. Elizur Butler, refused it. The interposition of the Supreme Court was now invoked in their behalf, and their cause was argued by the same counsel who had appeared for the Indians. The Court held that the law under which they were convicted was void, as being repugnant to the Constitution, laws, and treaties of the United States, and that the judgment of the Georgia Court ought to be reversed and annulled.

Marshall, *Chief Justice.* 'The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the Government of the Union.' 'The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the Government of the United States. The act of the State of Georgia, under which the plaintiff in error was prosecuted, is, consequently, void, and the judgment a nullity.'[1]

[1] Worcester *v.* Georgia, Peters' Reports, vol. vi., pp. 515–597. The Georgia authorities paid no attention to this decision of the

The judicial opinions of the Chief Justice which we have cited in the preceding pages will give the general reader an idea of his style and mode of reasoning. The march of his mind was in a direct line. He proceeded straight onward to his conclusions. He did not encumber himself, nor embarrass others with a mass of authorities. Discerning, as if by intuition, the principle upon which the decision must depend, he did not look far for cases either to illustrate or support it. Witness his judgment in the Dartmouth College case. In truth, however, on questions of constitutional law, there were no precedents to guide him. He was necessarily obliged to rely on the native strength of his mind; and it is here that his unrivalled penetration, his powers of analysis and combination, are most conspicuously displayed. In the decisions of what other jurist do we find such simple, connected, compacted, demonstrative reasoning? In acquisitions, in various legal knowledge, he has been surpassed by others; but for grasp of intellect, and profoundness of judgment, where shall we look for his equal? He was less dependent on mere learning than others; for, so distinguishing were his faculties, and so exquisite his penetration, that he unfolded the original principles which lie at the very foundations of the law. By the clear light of his reason he could

'—— sit in the centre and enjoy bright day.'

He had the 'liberal heart' and 'judging eye,' the clear head, and sound, good sense that insure wisdom of decision. By strict adherence to recognised autho-

Supreme Court, kept the missionaries in the penitentiary a year and a half under the judgment which that Court had declared utterly void, and only released them, at last, when the State had accomplished its objects with regard to the Indians.

rities, an industrious and conscientious, though inferior man, may make a good judge; he will not be likely to go very far wrong, or give much occasion for complaint. But when 'a new and troubled scene is opened, and the file affords no precedent,' then mediocrity is placed in a situation of infinite difficulty, and may do infinite mischief. Precisely in such a situation did the extraordinary abilities of Marshall find their most fitting theatre for display. Then was seen with what ease he could disentangle the complicated web which had vainly taxed the skill of others; with what rare facility he could 'penetrate, resolve, combine,' and with what an irradiating spirit he advanced to his conclusions.

'Enter but that hall,' says Judge Story, 'and you saw him listening with a quiet, easy dignity to the discussions at the Bar; silent, serious, searching; with a keenness of thought which sophistry could not mislead, or error confuse, or ingenuity delude; with a benignity of aspect which invited the modest to move on with confidence; with a conscious firmness of purpose which repressed arrogance, and overawed declamation. You heard him pronounce the opinion of the Court in a low, but modulated voice, unfolding in luminous order every topic of argument, trying its strength, and measuring its value, until you felt yourself in the presence of the very oracle of the law.'[1]

In forming his opinions, he depended more upon general principles than cases, though he yielded all proper respect to authority. 'He seized,' says Judge Story, 'as it were by intuition, the very spirit of juri-

[1] Story's Discourse, p. 68.

dical doctrines, though cased up in the armor of centuries; and he discussed authorities, as if the very minds of the judges themselves stood disembodied before him.'[1]

No judge, perhaps, was ever regarded with more veneration and affection than Chief Justice Marshall. The Bar and the country appreciated, and with pride and pleasure did homage to his extraordinary merits. In the discharge of his high duties there was so much gentleness, modesty, and simplicity, united with such depth and compass of mind, that the profession loved him quite as much as they admired and respected him. His demeanor on the Bench was a model of judicial dignity and courtesy. Whether the counsel was eminent, or comparatively little known, he listened with the same attention, patience, and respect. 'He was endowed by nature,' says Mr. Binney, 'with a patience that was never surpassed — patience to hear that which he knew already, that which he disapproved, that which questioned himself. When he ceased to hear, it was not because his patience was exhausted, but because it ceased to be a virtue.'[2] An illustration of this latter remark may be found in the following anecdote, as related by Judge Story. He used to tell with glee, that Chief Justice Marshall, on one occa-

[1] Story's Discourse, p. 70. The criticism of Lord Stowell, however, was hardly applicable to him. 'I rather think,' says that renowned magistrate, 'we are too fond of cases; when a matter is to be argued, we look immediately for the cases, and by them we are determined more than, perhaps, by the real justice that belongs to the question; this may enforce the uniformity of the law, which is certainly a very desirable purpose, but is by no means the first purpose that ought to be considered; for, if the judgment be erroneous, it is but an indifferent exposition of the law.' Story's Life and Letters, vol. i., p. 554. May 17th, 1828.

[2] Eulogy on John Marshall, p. 58.

sion, when a very pompous and tedious advocate was arguing a case before the Supreme Court, and going back to the undisputed and preadamite rules of the law, interrupted the course of his argument by saying:—'Mr. C——, I think this is unnecessary. There are some things which a Court constituted as this is may be presumed to know.'[1]

The Supreme Court, in his day, was an object of great attraction, and he the most interesting figure of the scene. 'At some moments,' says Miss Martineau, who was at Washington in the winter of 1835, 'this Court presents a singular spectacle. I have watched the assemblage while the Chief Justice was delivering a judgment;—the three judges on either hand gazing at him more like learners than associates; Webster standing firm as a rock, his large, deep-set eyes wide awake, his lips compressed, and his whole countenance in that intent stillness which instantly fixes the eye of the stranger;—Clay leaning against the desk in an attitude whose grace contrasts strangely with the slovenly make of his dress, his snuff-box for the moment unopened in his hand, his small, gray eye and placid half-smile conveying an expression of pleasure, which redeems his face from its usual unaccountable commonness;—the Attorney-General,[2] his fingers playing among his papers, his quick black eye, and thin tremulous lips for once fixed, his small face, pale with thought, contrasting remarkably with the other two;—these men, absorbed in what they are listening to, thinking neither of themselves, nor of each other, while they are watched by the groups of idlers and listeners around them,—the newspaper corps, the dark Cherokee

[1] Story's Life and Letters, vol. ii., p. 596.

[2] Benjamin F. Butler.

chiefs, the stragglers from the far west, the gay ladies in their waving plumes, and the members of either House that have stepped in to listen,—all these have I seen at one moment constitute one silent assemblage, while the mild voice of the aged Chief Justice sounded through the Court.'[1]

Having now contemplated Chief Justice Marshall as a magistrate, we shall proceed to trace his footsteps in other scenes of labor and public service.

[1] Martineau's Western Travel, vol. i., p. 275, English ed.

CHAPTER XII.

1800 – 1806.

HIS BIOGRAPHY OF WASHINGTON.

General Washington, as is well known, bequeathed all his valuable public and private papers to his favorite nephew, Mr. Justice Washington. When this circumstance came to the knowledge of the public, a Life of that eminent person, prepared from materials so copious and authentic, was eagerly anticipated. The publishers, too, foreseeing a large demand for such a work, early applied to Judge Washington to purchase the copy-right. In reply to a letter of this kind from Mr. Caleb P. Wayne, at that time editor and proprietor of the United States Gazette, he says: — 'With General Marshall, who is to write the history, I consulted, when I saw him in February last, respecting the proposition which you and others had made to purchase the copyright, with a view to making some estimate of its value; but being ignorant of such matters, we were unable to form even an opinion on the subject, particularly at this early stage of the work. We shall, therefore, decline any negotiation upon the subject for the present, but will keep in remembrance your two propositions, and will write you again when the work is more advanced.'[1]

[1] MS., April 11th, 1800. Washington died December 14th, 1799.

The agreement between Judge Washington and the Chief Justice seems to have been a very equitable one; the former was to furnish the papers, and the latter to prepare the biography, and the amount obtained for the copyright was to be divided equally between them. What estimate they placed upon this will be seen from the following extract of a letter written by Judge Washington to Wayne, at a time when the advanced condition of the work enabled them to form an opinion upon the subject: —

'Great exertions,' thus he writes, 'will be made to finish it in the course of the next year; and we are not without hopes of success, if the present order of the Courts be not disturbed, or very materially changed. At any rate, many of the volumes will be ready in that time, and may be put to press. . . . We have endeavored to form some estimate of the value of this work, with a view to a reasonable price at which to dispose of it. We suppose that less than a dollar a volume cannot be thought of; and, upon the calculation of thirty thousand subscribers in America, this would amount to $150,000, supposing there to be five volumes. This, that is, a dollar a volume, would content us, whilst it would leave a very large profit to the purchaser, and a still larger profit should he be also the printer. But the subscriptions may exceed or fall short of the number mentioned, and, to escape the trouble of that part of the business, we will consent to receive $100,000 for the copyright in the United States; less than this sum we will not take. . . . . Should you wish to purchase the entire right to this work, to dispose of in Europe as well as in the United States, you will say so; and, knowing the grounds upon which we calculate the value in the United

States, I could wish you to make an offer for the whole. We have received propositions for the purchase of the right to sell in Great Britain, upon which we have not yet decided.'[1]

In a subsequent letter to Wayne, he says: — 'To your ideas upon this subject I have given the fullest consideration; and I cannot help thinking that, however I may have exceeded or fallen short of the precise value of the work in question, the grounds of calculation which you assume must be erroneous. In asking for the author one dollar per volume, I think it impossible that I can be charged with demanding too much. The profit which this will leave to the printer and purchaser of the copyright is immense, and I choose it should be so. If I miscalculated then, in anything, it was in overrating the number of subscribers to be obtained in this country. I certainly believe that I was not very inaccurate as to this part of the subject. . . . As to the number you speak of, I can have no doubt but that it could be obtained in either of the four large towns in the United States.' 'Upon the whole, although I sincerely think that the sum mentioned in my former letter is a moderate estimate of the value of the American copyright, yet I acknowledge myself very little acquainted with the subject, and as apt as other men to be deceived. If you prefer a total abandonment of this right for a gross sum, and will state the highest sum which you think it prudent to offer, I will consider it, and give you both a speedy and candid answer. After having disclosed the ground upon which I made my calculation, and assured you of the sincerity with which it was made,

[1] MS., December 11th, 1801.

I should be at a loss for some principle upon which to name a smaller sum. Your superior information upon subjects of this kind may suggest reasons not perceived by me at this time. My wish is, that the purchaser may be not only safe, but liberally rewarded for the trouble he must encounter.'[1]

Soon after receiving this letter, Wayne made Judge Washington a visit at his place in Virginia, and, while there, agreed to buy the American copyright for seventy thousand dollars, provided he could furnish satisfactory security for the payment of the money. But his friends were unwilling to become liable for so large an amount, though ready to be bound for any sum which he might actually receive. In the latter case, as he wrote the Judge, 'the security would be for my integrity, and nothing would be involved in the success of the work.'[2] He therefore proposed, in place of a gross sum, to pay one dollar a volume for each copy of the work subscribed for, and to encounter all the trouble and expense of obtaining subscribers. After consulting with Judge Marshall upon the subject, Judge Washington, though still preferring a gross sum, acceded to Wayne's proposal. 'We cannot gratify the desire we feel to conform to your situation,' thus he writes, 'without yielding that point, and we shall do so. A prospectus will be prepared and forwarded shortly, for I agree with you that the sooner you set on foot the subscription the better.'[3]

[1] MS., Washington to Wayne, January 22d, 1802.

[2] MS., Wayne to Washington, March 17th, 1802.

[3] MS., May 9th, 1802. The contract was executed September 22d, 1802. 'The said Wayne,' so it was expressed, 'agrees to pay to the said Washington, his executors, administrators, and assigns, one dollar for every volume of the aforesaid work which may be sub-

Although Marshall had not been announced as the author of the proposed Life of Washington, yet the fact soon became generally known, and awakened no little jealousy and apprehension on the part of the Republicans. His politics were so decided, that it was assumed that he would give a party bias to the work. Two years before the first volume was published, Jefferson, with his usual facility in stating conjectures as facts, thus wrote his friend Joel Barlow, the author of the Columbiad, who was then residing at Paris: —

'Mr. Madison and myself,' he says, 'have cut out a piece of work for you, which is, to write the history of the United States, from the close of the war downwards. We are rich ourselves in materials, and can open all the public archives to you; but your residence here is essential, because a great deal of the knowledge of things is not on paper, but only within ourselves, for verbal communication. John Marshall is writing the Life of General Washington from his papers. It is intended to come out just in time to influence the next Presidential election. It is written, therefore, principally with a view to electioneering purposes. But it will, consequently, be out in time to aid you with information, as well as to point out the perversions of truth necessary to be rectified. Think of this, and agree to it.'[1]

The assertions thus hazarded by Jefferson as to the character and designs of the work were totally unfounded. 'The Democrats may say what they please,' wrote Judge Washington, 'and I have expected they

scribed for, or which may be sold and paid for at any time during the continuance of the copyright.'

[1] Jefferson's Works, vol. iv., p. 437. May 3d, 1802.

would say a great deal; but this is, at least, not intended to be a party work, nor will any candid man have cause to make this charge.'[1] The contrary impression, nevertheless, had an unfavorable influence in the canvass for subscribers. Weems, who had been rector of Mount Vernon parish, was one of the soliciting agents for the work. In a letter to the publisher from Baltimore, he says: — 'The people are very fearful that it will be prostituted to party purposes. I mean, of course, the Life of Washington. For Heaven's sake, drop now and then a cautionary hint to John Marshall, Esq.'[2] This sort of impression respecting the

[1] MS., Washington to Wayne, November 19th, 1802.

[2] MS., Mason L. Weems to C. P. Wayne, December 14th, 1802. As a book agent, Weems displayed unrivalled tact and activity. The following extract from one of his letters to Wayne, dated Annapolis, Md., December 22d, 1802, will show his mode of procedure. On his arrival there he found the Legislature in session. 'I instantly determined,' he says, 'the House still in session, to congregate them. Next morning I threw in a note to the Chair, soliciting the honor of uttering before them a *patriotic oration*. They came together. They were pleased, and have begun to subscribe.' 'Patriotic orations! Gazette puffs! Washingtonian anecdotes! sentimental, moral, military, and wonderful! — all should be tried, and every exertion made to push into every family, into every hand, so very interesting and highly moralizing a work as yours; but, alas! I am not able to do it on my present allowance.' It was on this idea of creating a sensation that Weems wrote his Lives of Washington, Marion, Franklin, and Penn; and the extraordinary success of those books shows that he possessed a profitable knowledge of human nature.

In a letter to Wayne from Frederick, Md., April 8th, 1803, he says: — 'Give old Washington fair play, and all will be well. I mean, let but the *interior* of the work be *liberal*, and the *exterior elegant*, and a town house and a country house, a coach, and sideboard of massy plate, shall all be thine. I sicken when I think how much may be marr'd. . . . God! I pray him, grant this work may bring moral blessings on our country, and honor and wealth on C. P. W. and M L. W.

work, coupled with the more serious objection to its cost, soon proved the fallaciousness of the expectations that had been entertained with regard to the demand for it. Instead of thirty thousand subscribers, as Judge Washington had anticipated, the number actually obtained fell short of eight thousand.

Owing to the pressure of his judicial duties, and the time and labor required to examine many trunks of papers, Marshall was unable to hasten the work as rapidly as the impatience of the subscribers demanded. They clamored loudly at the delay, but it was unavoidable. It was not until the winter of 1803–4, that the first volume was placed in the hands of the printer. It was Marshall's intention that his name should not appear as the author of the work; and he only yielded the point to the wishes of others.

'Unless there be some law,' thus he wrote his son, 'which I have not seen, the Clerk of the District Court, in my opinion, transcends his duty, and requires more than the act of Congress requires, when he demands the name of the author. If he persists in the demand, I wish Mr. Wayne to inform me of it, and I will then consult with Mr. Washington on the course to be pursued. But I wish Mr. Wayne, when he receives the title-page, which was sent some time since with the preface to Mr. Washington, to present it to the Clerk, and to call his attention to the law. I do not wish to give in my name as the author, and will only do so if it be unavoidable. The book is expressed to be written under the inspection of Judge Washington, and that, in my opinion, is more than sufficient.

'I wish Mr. Wayne to write freely to me on this subject, and to suggest, without difficulty, anything which occurs to him. I am not among those who feel

wounded at a criticism on my writings, and in the pre sent instance, at least, would much rather it should be directly made, than felt and suppressed. I am much inclined to believe that the first part of the work is too minute in its details, and have often regretted that I did not abridge it.'[1]

In a subsequent letter to Wayne he says: — 'My repugnance to permitting my name to appear in the title still continues; but it shall yield to your right to make the best use you can of the copy. I do not myself imagine that the name of the author being given or withheld can produce any difference in the number of subscribers; but if you think differently, I should be very unwilling, by a pertinacious adherence to what may be deemed a mere prejudice, to leave you in the opinion that a real injury has been sustained. I have written to Mr. Washington on this subject, and shall submit my scruples to you and him, only requesting that my name may not be given but on mature consideration and conviction of its propriety. If this shall be ultimately resolved on, I wish not my title in the Judiciary of the United States to be annexed to it. Mr. Washington will probably write to you; but I have requested that no decision be made, unless it shall be necessary, till I see him, which will be at Washington, early in February.'[2]

The question thus referred to Judge Washington was promptly decided. 'The Chief Justice,' he says, in a letter to Wayne, 'with great reluctance consents

[1] MS., December 23d, 1803. Letter to Thomas Marshall. Young Marshall, at this time, was in college at Princeton; but, at the date of his father's letter, staying for a few days in Philadelphia.

[2] MS., Marshall to C. P. Wayne, January 10th, 1804.

that his name as author may be inserted in the title-page, provided I insist upon it. It gives me pain to decide against his wishes; but I really think it necessary, for many reasons. He requests, however, that his name may be modestly introduced, without any addition of the title he bears as a member of the Judiciary. It will, I presume, be sufficient to say, "By John Marshall." He is of opinion that there is no necessity for inserting the number of volumes in the title-page, and in this I concur with him. It would be very embarrassing in this instance if it were otherwise, for it is next to impossible, at this time, to say whether there will be four or five volumes.'[1]

That innate modesty which pervaded Marshall's character, and diffused itself through all his actions, is very conspicuous in the letters addressed to his publisher during the progress of his work. 'If Mr. Short is in Philadelphia,' thus he wrote Wayne, 'present, with my compliments, my thanks for the aid he has been so good as to give you, and tell him the obligation would have been much greater, if he would more freely have corrected the inaccuracies which must have presented themselves to him as well as you. Indeed, my dear Sir, I am persuaded that I have reason to complain of you. I feared that you would not censure and alter freely, and, therefore, particularly requested that you would do so. I do not think you can have complied with my wishes. You mistake me very much, if you think I rank the corrections of a friend with the bitter sarcasms of a foe, or that I should feel either wounded or chagrined at my inattentions and inaccuracies being pointed out by another. I know there are many and

[1] MS., January 24th, 1804.

great defects in the composition — defects which I shall lament sincerely, and feel sensibly, when I shall see the work in print. The hurried manner in which it is pressed forward renders this inevitable.'[1]

Owing to his other engagements, and the urgency of the publisher for the manuscript, he was unable to give the work that thorough revision and retrenchment which were required; and, from another cause, was prevented from even correcting the proof-sheets. 'Although I ought to have known,' he says, 'that I was too far from Philadelphia to inspect the proof-sheets, I had still unaccountably considered the corrections I had made as to find a place in the first impression, and am not a little mortified to discover my mistake. There are, however, some very few inaccuracies which you will readily perceive ought to be mentioned in the *errata*. These are, where some word is obviously omitted, or has been mistaken for another. . . . I regret your determination to print a second edition immediately. I have not time to correct the first at present, nor can I have time till the work shall be completed. The employment of finishing the fourth volume, and of superintending the copying, added to my various other avocations, absolutely disable me from giving the sheets you send me such a reading as I can be satisfied with. The third volume has been, for some time, in Mr. Washington's hands, and I should hope has been forwarded to you before this time. . . . If you make an additional impression, I hope it will be a very small one, and I cannot consent to its being stated to be revised and corrected by the author. It would, perhaps, be as well to make the

[1] MS., April, 1804.

amendments which I have suggested, and to add to the number of the first edition so much as there may be an absolute demand for. I am anxious, before the books shall be very much multiplied, to give them a very serious reading at perfect leisure, and prepare them for a second edition. There are really errors in the present publication which manifest a greater degree of carelessness than I had suspected when I had only seen the manuscript.'

'My state of health requires that I should pass the residue of the summer in the mountain country. As I cannot take the papers with me to prosecute the work, I had proposed to retain the first volume, and to read it while in the country. Perhaps the transmission of the third to you will enable you to leave the first with me. I wish to know your situation in this respect.'[1]

The following letter was written after the first volume of the work had been published: —

'Sir: — I have received your letter with part of the sheets of the second volume, and your resolution to postpone the second edition of the first. I am just setting out for the upper country, where I shall give the first volume one considerate reading, and then forward it to you by the post. You will please to direct to me at Front Royal, Frederick County, Virginia. . . . I have no doubt that the errors noticed are principally, if not entirely, in the manuscript. Some very few, I believe, are not; but they are very few. I am confident of the care you have bestowed on the subject, and wish every other person could have performed

[1] MS. Letter to Wayne, July 4th, 1804.

his part with as much attention and exactness as you have done. I thank you for the two papers you sent me. I take the Gazette of the United States, and shall, of course, see anything which may appear in that paper. The very handsome critique in the Political and Commercial Register was new to me. I could only regret that there was in it more of panegyric than was merited. The editor of that paper, if the author of the critique, manifests himself to be master of a style of a very superior order, and to be, of course, a very correct judge of the compositions of others.

'Having, Heaven knows how reluctantly, consented against my judgment to be known as the author of the work in question, I cannot be insensible to the opinions entertained of it; but I am much more solicitous to hear the strictures upon it, than to know what parts may be thought exempt from censure. As I am about to give a reading to the first volume, and as not much time can be employed upon it, the strictures of those who are either friendly or hostile to the work may be useful, if communicated to me, because they may direct my attention to defects which might otherwise escape a single reading, however careful that reading may be. I will, therefore, thank you to convey to me at Front Royal every condemnatory criticism which may reach you. It would be impossible, and I shall not attempt to polish every sentence. That would require repeated readings, and a long course of time; but I wish to correct obvious imperfections, and the animadversions of others would aid me very much in doing so.'[1]

In reply to this letter Wayne thus writes:—'Every

[1] MS., Marshall to Wayne, July 20th, 1804.

review of the work which I can lay my hand on shall be forwarded to you. The editor of the Commercial and Political Register is William Jackson, Esq., formerly, I believe, an aid to General Washington, and recently dismissed from a situation in the custom-house. He bears the title of Major. You will pardon me for mentioning what I have heard spoken of as a fault in the work; it is where the *enemy* is spoken of. It has been suggested that an author ought not to write as an American, but assume an independent ground. I understand the volume will be reviewed in a magazine published here. I shall send it.'[1]

'I have the pleasure of being acquainted with Major Jackson,' says Marshall in answer to the above, 'and have a high opinion of his taste and judgment. I heard him deliver a very excellent oration on the death of General Washington — one of the best which that melancholy occasion produced. You need make no apology for mentioning to me the criticism on the word "enemy." I am glad you have done so. I will endeavor to avoid it where it can be avoided. It has, probably, been used improperly, and unnecessarily, but may, I think, be occasionally employed without censure. A historian, it is true, is of no nation, but the person whose history he writes is; and the word is used to denote, not the enemy of the author, but of the person or army whose actions the historian is relating. I wish, however, if it can be done, that the third volume may be corrected in this respect, when, without repetition, the term may be changed. For the first and second the correction can only be made for the second edition.

[1] MS., Wayne to Marshall, July 25th, 1804.

'I am just finishing a review of the first volume, and am mortified beyond measure to find that it has been so carelessly written. Its inelegancies are more numerous than I had supposed could have appeared in it. I have thought it necessary to reconstruct very many of the sentences, and am sorry to impose on you the task of changing your types so materially. I hope you have not printed a greater number of the second volume than you have of the first, and that you will not print a greater number of the third. I lament that the first edition is so large as you have made it. . . . I have directed my son to make a present to the Whig Society in Princeton of a copy of the work. I could wish it to be of the second edition.'[1]

The criticism of Major Jackson's upon the first volume bestows merited praise upon the author, and more reservedly, perhaps, applause upon his work.

'The first volume of the Life of Washington,' he says, 'has now been some time before the public. The author of this work, Mr. Marshall, has every claim to stand in the foremost rank of our distinguished men. To the merit which belongs to professional exaltation he has added that of an able ambassador, and an eloquent legislator. Passing from these characters, he

[1] MS. Letter to Wayne, August 10th, 1804. In the following year he requests Wayne to send a copy of the work, so far as completed, to his friend, the late President of the United States. 'I will thank you,' he writes, 'to take some opportunity of sending three volumes to Mr. Adams, with the following words written on a blank leaf in each: — "Mr. Adams is requested to accept a copy of the Life of Washington, as a small mark of the respect and attachment of his obliged and obedient servant,

'"THE AUTHOR."

'"June 7th, 1805.

now fills, with acknowledged ability, the office of first judicial magistrate of our nation. If he succeeds as an author and historian, it can only be from that variety of excellence which belongs to minds of the highest order. . . . Seldom, if ever, has any book gone into the world under the circumstances which mark the appearance of Mr. Marshall's. He cannot be entirely regarded as the voluntary author of it. The Abbe Barthelimie spent thirty years in writing the travels of Anacharsis; and the historian of The Decline and Fall of the Roman Empire employed the labor of a life upon his work. But the biographer of the Life of Washington tells us, "that the public were already looking for his work before the writer was fixed on, or the documents from which it was to be composed, placed in his hands." Since the writer was fixed on, and the materials furnished, not three years have elapsed, and four octavo volumes are prepared for the press. It must be added, that, during this very short period, the labors of the author have been mixed with a regular attention to the duties of an office of the highest importance and difficulty.

'Under this great disadvantage has the first volume of the Life of Washington been placed in our hands, and yet we hope there will not be that disappointment the author has anticipated. Whoever expects to see, in a work thus rapidly written, every sentence highly polished, who looks in every page for the splendid ornament of Gibbon, or the continued elegance of Hume, may not have his expectations answered; but it has, nevertheless, conspicuous merit. The style is chaste, energetic, and elevated. A narrative interesting, because it is our own history, but deficient in striking incident, is conducted with ease and perspicuity, and every proof afforded of a mind vigorous,

comprehensive, and discriminating. We highly applaud Mr. Marshall's plan of presenting, under one view, the history of the first settlement and early progress of the different colonies. It is a proper introduction to his work, and forms a valuable accession to American literature. In the latter part of the volume, where events of a higher interest are described than those on which the earlier pages of it are occupied, we mark in Mr. Marshall's style a corresponding elevation.'[1]

Major Jackson's criticism, unhappily, did not speak the public voice. The first volume of the work occasioned general disappointment. Neither in matter nor manner did it meet the public expectations. It contained nothing new, and the style was not more attractive than the annals and histories from which it was compiled. The critics exposed its infelicities of expression, and everybody pronounced it dull. It certainly, for a time, detracted from Marshall's reputation for ability. Nevertheless, there are passages in that volume which indicate talents for historical composition, of no common order. His portraiture of Pitt may be cited as an example: —

'Mr. Pitt,' he says, 'had long been distinguished in the House of Commons for the boldness and splendor of his eloquence. His parliamentary talents, and the independent grandeur of his character, had given him a vast ascendency in that body, and had made him the idol of the nation. In 1756 he had been introduced into the councils of his sovereign; but dissenting essentially from the system adopted for the prosecution of

[1] Political and Commercial Register, July 9th, 1804.

the war, he retained his station for a very short time. The public affection followed him out of office, and the national disasters continuing, it was found impracticable to conduct the complicated machine of government without his aid. In the summer of 1757, an Administration was formed so as to conciliate the great contending interests in Parliament, and Mr. Pitt was placed at its head. The controlling superiority of his character gave him, in the Cabinet, the same ascendency which he had obtained in the House of Commons, and he seemed to dictate the measures of the nation. But a very short time was necessary to show that, in this extraordinary man, were combined qualities seldom united in the same person. His talents for action seemed even to eclipse those he had displayed in debate; and in directing the vast and complicated movements of a war, extending on both elements over every quarter of the world, he unfolded a vigor of mind, a clearness of judgment, and a decision of character, surpassing the expectations even of those who had been long accustomed to admire the firmness with which he had pursued his political course. His plans, partaking of the proud elevation of his own mind, and the exalted opinion he entertained of his countrymen, were always grand; and the means he employed for their execution never failed to be adequate to the object. Possessing without limitation the public confidence, he commanded all the resources of the nation, and drew liberally from the public purse; but the money was, at all times, faithfully and judiciously applied in the public service. Too great in his spirit, too sublime in his views, to become the instrument of faction, when placed at the head of the nation, he regarded only the interest of the nation, and overlooking the country, or the party which had given birth to merit, he searched

for merit only, and employed it wherever it could be found. From the elevation of the house of Brunswick to the British throne, a very considerable portion of the people, under the denomination of tories, had been degraded, persecuted, and oppressed. Superior to this narrow and short-sighted policy, Mr. Pitt sought to level these enfeebling and irritating distinctions, and to engage every British subject in the cause of his country. Thus, equally commanding the strength and the wealth of the kingdom, with perhaps greater talents, he possessed certainly greater means than any of his predecessors.'

Marshall felt very keenly the strictures of the press. 'I wish very sincerely,' he writes Wayne, 'that some of those objections which are now made to the plan of the work had been heard when the proposals for subscription were first published. I should very readily have relinquished my opinion respecting it, if I had perceived that the public taste required a different course. I ought, indeed, to have foreseen that the same impatience which precipitated the publication would require that the life and transactions of Washington should be immediately entered upon; and, if my original ideas of the subject had been preserved in the main, yet I ought to have departed from them, so far as to have composed the introductory volume at leisure, after the principal work was finished.

'I have also to sustain increased mortification on account of the careless manner in which the work has been executed. I had to learn that, under the pressure of constant application, the spring of the mind loses its elasticity, and that the style will be insensibly

influenced by that of the authors we have been perusing. That compositions thus formed require constant revisals when the impression under which they were written has worn off. But regrets for the past are unavailing. It is of more service to do what is best under existing circumstances. There will be great difficulty in retrieving the reputation of the first volume, because there is a minuteness and a want of interest in details of the transactions of infant settlements, which will always affect the book containing them, however it may be executed. I have, therefore, some doubts whether it may not be as well to drop the first volume for the present, that is, not to speak of a republication of it, and to proceed with the others. I shall, at all events, conform to your request, and be silent respecting the corrections I have prepared.'[1]

On receiving a printed copy of the second volume, the Chief Justice wrote the publisher as follows: —

'I have been critically examining the second volume since my return, and am sorry to find that, especially in the first chapter, there is much to correct. The third I hope will not be so defective, and it shall be my care to render the fourth more fit for the public eye. I wish it was possible for me to receive the proof-sheets. But I suppose it is not. . . . . Should there be a second edition, the volumes will all be reduced within the compass you propose, and will, of course, receive very material corrections. On this subject, however, I remain silent. Perhaps a free expression of my thoughts respecting the inaccuracies of the present edition may add to the current which

[1] MS. Letter to Wayne, September 3d, 1804.

seems to set against it, and may, therefore, be for the present indiscreet. . . . The first edition should be completely in possession of the public before a second is spoken of.'[1]

The three first volumes of the work were published in the course of the year 1804, the fourth in the ensuing year,[2] and the fifth in 1807. This latter volume, relating to Washington's administration of the Government, was a work of great labor.

'The unavoidable delays,' he says, 'the immense researches among volumes of manuscripts, and chests of letters and gazettes, which I am compelled to make, will impede my progress so much, that it is absolutely impossible to get the residue of the work completed in the short time which remains to be devoted to it. I regret this at least as much as you do, but cannot prevent it. I hope you will be able to employ yourself profitably on some other work until the succeeding volume shall be ready for you, which will be, I hope, next spring, as I shall apply to it again the instant I return from the Supreme Court. I flatter myself the numbers of the first edition will not be multiplied. I would not be understood to think humbly of it as re-

[1] MS., September 8th, 1804.

[2] 'I believe,' he writes, 'the fourth volume to be much less inaccurate than those which preceded it, as I have bestowed much more attention on the style than was given to them. Yet I cannot flatter myself that it will not need a considerable reform. I am confident that I shall perceive, when I read it in print, many defects that escape me in manuscript. I should, therefore, wish it were possible to see the proof-sheets, or to correct a copy as I have done the three first, before the additional number of copies shall be printed. But if this would occasion you additional expense, I would not wish it.' MS Letter to Wayne, February 27th, 1805.

vised. I have not read more than one hundred pages of the revised copy; but I am persuaded that, had the whole work come out originally in that form, it would have been better received. Yet the revisal given to the first impression was not only hasty, but pursued so unremittingly, that many inaccuracies, and still more inelegancies, must have escaped me. For the sake of giving to the world a more careful correction of the work, and for the sake of some essential alterations which I contemplate, I wish a second edition; and I am confident that every volume added to the first must tend to prevent any demand for a second edition.'[1]

The anxious wish of the Chief Justice, that there should be a revised and improved edition of the Life of Washington, was not gratified. A second edition of the original work was never called for. He prepared,

[1] MS. Letter to Wayne, October 5th, 1805. At the date of this letter, he was just recovering from a bilious fever. Two weeks later, October 19th, 1805, he wrote as follows: — 'Immediately after writing to you, my fever returned, and I am not yet recovered. My ill-health is not more unwelcome on its own account, than on account of the additional delays it will create in the business in which I am engaged. That these delays should affect you in any degree I sincerely lament. They are occasioned by several accidents which concur, with the nature of the work (which requires researches beyond measure laborious), to protract the time of its completion. But you may be assured that your interest is still more concerned in having time taken to digest the materials properly, than in the celerity with which they are thrown together. Be this as it may, my health has compelled me to take refuge in the mountains from the sultry heats of our climate; and the continuing fever under which I have labored since my return, and which is only stopped to-day, and still threatens me with a visit, admonishes me that my return was premature, and has prevented my deriving, from the time I counted on employing in this important business, the benefits I expected.'

however, an abridged edition, which preserved all the essential information of the larger work, without its prolixity, and proved much more acceptable to the public. It was published in two volumes, in 1831.[1] He also prepared an edition of the latter for the use of schools, which, however, did not make its appearance until after his death. The candor that pervades these productions has been remarked as among their characteristic excellences. Jefferson, it is true, took exception to the note in the fifth volume of the original work, respecting his letter to Mazzei. That letter, written in April, 1796, was published at Florence, and afterwards at Paris, in the Moniteur. It attributed monarchical designs to the leaders of the Federal party, and asserted that they wished to introduce into the United States the substance, as they had already done the forms,[2] of the British Government. The editor of the Moniteur accompanied the letter with very severe strictures on the conduct of the United States, and it was supposed that our difficulties with France were complicated in consequence of it. In a letter to Martin Van Buren, in 1824, Jefferson, after declaring that an entire paragraph had been interpo lated into his letter to Mazzei, (and, as he surmised, by the persons in power at Paris,) by which he was made to charge his own country with ingratitude and injustice to France, proceeds to say, 'And even Judge Marshall makes history descend from its dignity, and the ermine from its sanctity, to exaggerate, to record, and to sanction this forgery.'[3]

[1] The introductory part of the work had been previously published as a distinct work, called the 'History of the Colonies.'

[2] It was printed 'form' in the foreign papers; but Jefferson says he wrote 'forms,' referring to the President's levees, birth-days, &c.

[3] Jefferson's Works, vol. vii., p. 366. It is curious that Jefferson,

In the abridged edition of his work, the Chief Justice replies to this charge of Mr. Jefferson, and vindicates himself with irresistible cogency.[1] This, we believe, is the only instance in which he was called upon to assert his candor and impartiality.

We have seen how unfavorable were the circumstances under which the Life of Washington was written and submitted to the public eye. It, nevertheless possesses great and undeniable merit. It is full, impartial, and accurate. It has always ranked as a standard authority. It is, however, the work of a jurist, and not of an artist. The style is something jejune. It lacks spirit, picturesqueness, and warmth of coloring. It has nothing of 'the long-resounding march, and energy divine;' nothing of the glow, the *ardentia verba*, that distinguish the more celebrated productions of Chief Justice Jay. At the same time, as we have before remarked, the work evinces talents for literary labor, which, with a more exclusive devotion to that object, would have joined to the praise of solid merit the attractions of grace and elegance. His delineation of the person and character of Washington may serve as an illustration of this latter observation.

'General Washington,' he says, 'was rather above the common size, his frame was robust, and his constitution vigorous, capable of enduring great fatigue, and requiring a considerable degree of exercise for the preservation of his health. His exterior created in the

in a letter to Mr. Madison, just after the publication of the Mazzei letter in this country, while giving very politic reasons for not publicly noticing it, does not insinuate that the paragraph in question was an interpolation; but admits that the letter, in substance, was his. Vide Letter to James Madison, August, 1797.

[1] His reply is contained in a note.

beholder the idea of strength united with manly gracefulness. His manners were rather reserved than free, though they partook nothing of that dryness and sternness which accompany reserve when carried to an extreme; and, on all proper occasions, he could relax sufficiently to show how highly he was gratified by the charms of conversation, and the pleasures of society. His person and whole deportment exhibited an unaffected and indescribable dignity, unmingled with haughtiness, of which all who approached him were sensible; and the attachment of those who possessed his friendship, and enjoyed his intimacy, was ardent, but always respectful. His temper was humane, benevolent, and conciliatory; but there was a quickness in his sensibility to anything apparently offensive, which experience had taught him to watch and to correct. . . . He made no pretensions to that vivacity which fascinates, or to that wit which dazzles, and frequently imposes on the understanding. More solid than brilliant, judgment rather than genius constituted the most prominent feature of his character.

'As a military man, he was brave, enterprizing, and cautious. That malignity which has sought to strip him of all the higher qualities of a general, has conceded to him personal courage, and a firmness of resolution which neither dangers nor difficulties could shake. But candor will allow him other great and valuable endowments. If his military course does not abound with splendid achievements, it exhibits a series of judicious measures, adapted to circumstances, which probably saved his country. . . .

'No man has ever appeared upon the theatre of public action, whose integrity was more incorruptible, or whose principles were more perfectly free from the contamination of those selfish and unworthy passions

which find their nourishment in the conflicts of party. Having no views which required concealment, his real and avowed motives were the same; and his whole correspondence does not furnish a single case, from which even an enemy would infer that he was capable, under any circumstances, of stooping to the employment of duplicity. No truth can be uttered with more confidence, than that his ends were always upright, and his means always pure. He exhibited the rare example of a politician, to whom wiles were absolutely unknown, and whose professions to foreign governments, and to his own countrymen, were always sincere. In him was fully exemplified the real distinction which forever exists between wisdom and cunning, and the importance as well as truth of the maxim, that 'honesty is the best policy.'

CHAPTER XIII.

1829.

VIRGINIA STATE CONVENTION.

The original Constitution of Virginia was formed in 1776. It continued in existence for more than half a century; but, at the session of the Virginia Legislature, in 1827–8, the question was submitted to the people of the State whether a convention should be called to revise it. It was carried in the affirmative. The subject was viewed throughout the State with absorbing interest. A party, powerful in wealth, talents, and social position, were invincibly opposed to any important innovation in the fundamental law. Another, and more numerous party, with champions of acknowledged character and abilities, were, in some essential particulars, for laying the axe at the root of the tree. They would extend the right of suffrage, readjust the basis of representation, reform the judiciary, and make other and important changes. The discussion of these opposing sentiments produced great excitement throughout Virginia. Both parties naturally selected their ablest advocates to represent them in the Convention. The result was, that a body of men were brought together, scarcely inferior to the renowned Convention of 1788.

Chief Justice Marshall was elected a member, as were also the ex-Presidents Madison and Monroe. The

Convention assembled at the Capitol, in Richmond, October 5th, 1829. A gentleman, who attended their debates a fortnight, has given a very graphic description of several of the more eminent members. 'Mr. Madison,' he says, 'sat on the left of the Speaker, Mr. Monroe on the right.[1] Mr. Madison spoke once for half an hour; but, although a pin might have been heard to drop, so low was his tone, that from the gallery I could distinguish only one word, and that was, "Constitution." He stood not more than six feet from the Speaker. When he rose, a great part of the members left their seats, and clustered around the aged statesman, thick as a swarm of bees. Mr. Madison was a small man, of ample forehead, and some obliquity of vision, (I thought the effect probably of age,) his eyes appearing to be slightly introverted. His dress was plain; his overcoat a faded brown surtout. Mr. Monroe was very wrinkled and weather-beaten; ungraceful in attitude and gesture, and his speeches only common-place. Mr. Giles wore a crutch — was then Governor of the State. His style of delivery was perfectly conversational — no gesture, no effort; but in ease, fluency, and tact, surely he had not there his equal; his words were like honey pouring from an eastern rock.

'Judge Marshall, whenever he spoke, which was seldom, and only for a short time, attracted great attention. His appearance was revolutionary and patriarchal. Tall, in a long surtout of blue, with a face of genius, and an eye of fire, his mind possessed the rare faculty of condensation; he distilled an argument down to its essence. There were two parties in the

[1] Mr. Monroe was chosen President of the Convention; but, owing to his indisposition, the chair was chiefly occupied by Mr. Powell and P. P. Barbour.

House; the Western, or radical, and the Eastern, or conservative. Judge Marshall proposed something in the nature of a compromise.

'John Randolph was remarkably deliberate, distinct, and emphatic. He articulated excellently, and gave the happiest effect to all he said. His person was frail and uncommon; his face pale and withered; but his eye radiant as a diamond. He owed, perhaps, more to his manner than to his matter; and his mind was rather poetical than logical. Yet, in his own particular vein, he was superior to any of his cotemporaries. Benjamin Watkins Leigh cut a distinguished figure in the Convention, as the leader of the lowland party. His diction is clear, correct, elegant, and might be safely committed to print just as spoken. Yet, high as he stands, he is not, perhaps, in the highest rank of speakers. He never lightens, never thunders; he can charm, he can convince, but he can hardly overwhelm. Mr. Tazewell I never saw up but once, for a moment, on a point of order; a tall, fine-looking man. P. P. Barbour presided over the body with great dignity and ease.'[1]

The question which excited most feeling, both in the Convention and out of it; the question which threatened to produce the most fatal results, putting in jeopardy the union and integrity of the State, related to the basis of representation. The Western districts contended for an equal representation of the free white population; the Eastern, or rather, as John Randolph said, 'the great slave-holding and tobacco-planting districts,' would found representation upon a combination

[1] Howe's Virginia Historical Collections, page 313. This sketch of the Convention was originally printed in a newspaper, under the signature of C. C.

of persons and property. The debate upon this subject was conducted with great ability and earnestness, and extended through several weeks.

Much irritation prevailed, and great apprehensions began to be entertained that the Convention would separate without adopting any plan to allay the divivisions, and restore the tranquillity of the State. At this portentous moment, however, several propositions for a compromise were introduced. It was now that the Chief Justice rose, and addressed the Convention. His voice was feeble, and those who sat far off could not hear him. Whenever, therefore, he spoke, 'the members would press towards him, and strain, with outstretched necks and eager ears, to catch his words.'[1] His candor, and courtesy of manner, attracted and conciliated all parties.

'No person in the House,' said he, 'can be more truly gratified than I am, at seeing the spirit that has been manifested here to-day; and it is my earnest wish that this spirit of conciliation may be acted upon in a fair, equal, and honest manner, adapted to the situation of the different parts of the Commonwealth which are to be affected. As to the general propositions which have been offered, there is no essential difference between them. That the Federal numbers and the plan of the white basis shall be blended together, so as to allow each an equal portion of power, seems very generally agreed to. The difference is, that one party applies these two principles separately, the one to the Senate, the other to the House of Delegates; while the other party proposes to unite the two principles, and to carry them in their blended form

[1] Southern Literary Messenger, vol. ii., p. 188.

through the whole Legislature. One gentleman differs in the whole outline of his plan. He seems to imagine that we claim nothing of republican principles, when we claim a representation for property. Permit me to set him right. I do not say that I hope to satisfy him, or others, who say that republican government depends on adopting the naked principle of numbers, that we are right; but I think I can satisfy him that we do entertain a different opinion. I think the soundest principles of republicanism do sanction some relation between representation and taxation. Certainly no opinion has received the sanction of wiser statesmen and patriots. I think the two ought to be connected. I think this was the principle of the Revolution; the ground on which the colonies were torn from the mother country, and made independent States.

'I shall not, however, go into that discussion now. The House has already heard much said about it. I would observe, that this basis of representation is a matter so important to Virginia, that the subject was reviewed by every thinking individual before this Convention assembled. Several different plans were contemplated. The basis of white population alone; the basis of free population alone; a basis of population alone; a basis compounded of taxation and white population (or, which is the same thing, a basis of Federal numbers); two other bases were also proposed, one referring to the total population of the State, the other to taxation alone. Now, of these various propositions, the basis of white population, and the basis of taxation, alone are the two extremes. Between the free population, and the white population, there is almost no difference. Between the basis of total population and the basis of taxation, there is but little difference. The people of the East thought that they

offered a fair compromise, when they proposed the compound basis of population and taxation, or the basis of the Federal numbers. We thought that we had republican precedent for this — a precedent given us by the wisest and truest patriots that ever were assembled; but that is now past. We are now willing to meet on a new middle ground, beyond what we thought was a middle ground, and the extreme on the other side. We considered the Federal numbers as middle ground, and we may, perhaps, now carry that proposition. The gentleman assumed too much when he said that question was decided. It cannot be considered as decided, till it has come before the House. The majority is too small to calculate upon it as certain in the final decision. We are all uncertain as to the issue. But all know this, that if either extreme is carried, it must leave a wound in the breast of the opposite party, which will fester and rankle, and produce I know not what mischief. The majority, also, are now content once more to divide the ground, and to take a new middle ground. The only difficulty is, whether the compromise shall be affected by applying one principle to the House of Delegates, and the other to the Senate, or by mingling the two principles, and applying them in the same form to both branches of the Legislature? I incline to the latter opinion. I do not know, and have not heard, any sufficient reason assigned for adopting different principles in the two branches. Both are the Legislature of Virginia, and if they are to be organized on different principles, there will be just the same divisions between the two, as appears in this Convention. It can produce no good, and may, I fear, produce some mischief. It will be said, that one branch is the representation of one division of the State, and the other branch of another

division of it. Ought they not both to represent the whole? Yet I am ready to submit to such an arrangement, if it shall be the opinion of a majority of this House. If this Convention shall think it best that the House of Delegates shall be organized in one way, and the Senate in another, I shall not withhold my assent. Give me a Constitution that shall be received by the people; a Constitution in which I can consider their different interests to be duly represented, and I will take it, though it may not be that which I most approve. . . .

'The principle, then, which I propose as a compromise is, that the apportionment of representation shall be made according to an exact compound of the two principles, of the white basis and of the Federal numbers, according to the census of 1820.'

This 'exact compound' would have given, as the basis of representation, the whole white population, and three-tenths of the colored, whether bond or free. After considerable discussion, the Chief Justice again addressed the Convention, and his speech, though short, 'was at the time regarded as an unrivalled specimen of lucid and conclusive reasoning.'[1]

'Two propositions,' he said, 'respecting the basis of representation, have divided this Convention almost equally. One party has supported the basis of white population alone, the other has supported a basis compounded of white population and taxation; or, which is the same thing in its results, the basis of Federal numbers. The question has been discussed, until discussion has become useless. It has been argued, until

[1] Southern Literary Messenger, vol. ii., p. 188.

argument is exhausted. We have now met on the ground of compromise. . . . One party proposes that the House of Delegates shall be formed on the basis of white population exclusively, and the Senate on the mixed basis of white population and taxation, or on the Federal numbers. The other party proposes that the white population shall be combined with Federal numbers, and shall, mixed in equal proportions, form the basis of representation in both Houses. This last proposition must be equal. All feel it to be equal. If the two principles are combined exactly, and, thus combined, form the basis of both Houses, the compromise must be perfectly equal. . . .

'After the warm language (to use the mildest phrase) which has been mingled with argument on both sides, I heard, with inexpressible satisfaction, propositions for compromise proposed by both parties, in the language of conciliation. I hail these auspicious appearances with as much joy as the inhabitant of the polar regions hails the reappearance of the sun after his long absence of six tedious months. Can these appearances prove fallacious? Is it a meteor we have seen, and mistaken for that splendid luminary which dispenses light and gladness throughout creation? It must be so, if we cannot meet on equal ground. If we cannot meet on the line that divides us equally, then take the hand of friendship, and make an *equal* compromise; it is vain to hope that *any* compromise can be made.'

A gentleman from Augusta County, who had taken a prominent part in the debate, and certainly displayed a good deal of ability, replied to the Chief Justice. One of his friends pronounced his argument to be unanswerable. This called up John Randolph,

whose esteem and admiration for Judge Marshall, we are told (though they differed widely on Federal politics) amounted almost to idolatry.[1]

'The statement of the argument,' said he, 'by the gentleman from Richmond, the Chief Justice of the United States, had been such, as to put at defiance all that gentleman had said, or all that any man on earth could say. Where was the necessity of defending the fortress of Gibraltar against the abortive and puny attacks of the gentleman from Augusta? The Chief Justice had put the argument on ground which never could be shaken; and which had no more been impugned, than the fortress of Gibraltar could be affected, by attacking it with a pocket pistol. He had put it in a light — I do not mean any compliment — in which he puts everything that he attempts to place in a clear light. He had shown that the weak and helpless government proposed in the plan of the gentleman from Frederick was not what it was represented to be, and had shown them what *was* a compromise.'

On the various questions relating to the Judiciary, the Chief Justice manifested great interest. He was particularly anxious to preserve the county court system; a system, by the bye, which Mr. Jefferson regarded with the utmost aversion. The justices of these courts, said the latter, 'are self-chosen, are for life, and perpetuate their own body in succession forever, so that a faction once possessing themselves of the Bench of a county, can never be broken up, but hold their county in chains forever indissoluble. Yet these justices are the real Executive, as well as Judi

[1] Southern Literary Messenger, vol. ii., p. 188.

ciary, in all our minor and most ordinary concerns. They tax us at will; fill the office of sheriff . . . name nearly all our military leaders, which leaders, once named, are removable but by themselves. The juries, our judges of all fact, and of law when they choose it, are not selected by the people, nor amenable to them. They are chosen by an officer named by the Court and Executive.'[1] Judge Marshall, on the contrary, adverting to the practical operation of these courts, would preserve them, and preserve, too, the mode in which the justices were appointed.

'I am not in the habit,' he said, 'of bestowing extravagant eulogies upon my countrymen; I would rather hear them pronounced by others; but it is a truth, that no State in the Union has hitherto enjoyed more complete internal quiet than Virginia. There is no part of America, where less disquiet, and less of ill-feeling between man and man is to be found, than in this Commonwealth; and I believe, most firmly, that this state of things is mainly to be ascribed to the practical operation of our county courts. The magistrates who compose those courts consist, in general, of the best men in their respective counties. They act in the spirit of peace-makers, and allay, rather than excite, the small disputes and differences which will sometimes arise among neighbors. It is certainly much owing to this, that so much harmony prevails amongst us. These courts must be preserved: if we part with them, can we be sure that we shall retain among our justices of the peace the same respectability and weight of character as are now to be found? I think not.'

[1] Jefferson's Works. Letter to Samuel Kerchival, July 12th, 1816.

John Randolph declared that he had long considered the county court system as one of the main pillars 'in the ancient edifice of our State Constitution.' In the course of the discussion upon this subject, 'the Chief Justice, thinking that some remark of his had been understood by Mr. Randolph as personally unkind, arose with earnestness to assure him it was not so intended. Mr. R. as earnestly strove to quiet Judge M.'s uneasiness, by assuring him that he had not understood the remark as offensive. In their eagerness, the one to apologize, and the other to show that no apology was necessary, they interrupted each other two or three times: at length Mr. R. effectually silenced his friend by saying, "I know the goodness of his heart too well to have supposed it possible that he could have intended to give me pain. Sir, I believe that, like My Uncle Toby, *he would not even hurt a fly!*"'[1]

One clause of the proposed Constitution provided that no modification or abolition of any court should be construed to deprive any judge thereof of his office; but such judge should perform any judicial duties which the Legislature might assign him. It met with great opposition; but was supported with equal earnestness by Judge Marshall. He contended that the independence of the judges was absolutely essential. 'I have grown old in the opinion,' said he, 'that there is nothing more dear to Virginia, or ought to be dearer to her statesmen, and that the best interests of our country are secured by it. Advert, Sir, to the duties of a judge. He has to pass between the Government and the man whom that Government is prosecuting:

[1] Southern Literary Messenger, vol. ii., p. 188.

between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance that, in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security, and the security of his property, depends on that fairness? The judicial department comes home, in its effects, to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree, important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?' 'We have heard about sinecures and judicial pensioners. Sir, the weight of such terms is well known here. To avoid creating a sinecure, you take away a man's duties, when he wishes them to remain; you take away the duty of one man, and give it to another: and this is a sinecure. What is this, in substance, but saying, that there is no such thing as judicial independence? You may take a judge's duties away, and then discard him. What is this but saying, that there is, and can be, and ought to be, no such thing as judicial independence?' 'I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary. Will you draw down this curse upon Virginia? Our ancestors thought so; we thought so till very lately; and I trust the vote of this day will show that we think so still.'

Judge Marshall objected to that clause of the proposed Constitution which inhibited the Senate from altering a money bill, and confined their action simply

to its approval or rejection. 'He never could conceive,' he said, 'the reason in favor of this part of the old Constitution. It had always appeared to him to have been introduced into it, from an assimilation of the Senate to the House of Lords. . . . But nothing could be more dissimilar than our Senate and the House of Lords, which was a paramount body, hereditary in its structure, sitting in its own right, and naturally apt to be much under the influence of the Crown.' 'But there was nothing of this sort in Virginia. The members of the Senate were as much the representatives of the people as those of the House of Delegates. They were elected in the same manner, by the same persons, and they receive the same pay as members of the other House.' On his motion, the clause was struck out.

Among the noticeable votes of the Chief Justice was one against empowering the Legislature to declare, by law, the disqualification of any person to hold office under the Government of Virginia, who should fight a duel, or send or accept a challenge, or act as second to either party, or knowingly be the bearer of a challenge.[1] As he did not explain the reasons that in-

[1] This provision was incorporated into the Constitution by a large majority; by a vote of more than two-thirds of the members in its favor. As Virginia, in the previous Presidential election, had voted for General Jackson, who had been engaged in several duels and rencontres, it gave John Randolph an opportunity to make one of his characteristic retorts. 'You will vote for a man,' said he, 'who has fought a duel, for President of the United States, and then you come back here, and gravely declare that no such man shall be a member of that august and illustrious assembly, the House of Burgesses! Sir, it is over-shooting the mark. . . It is a sanctimonious sort of republicanism not to my taste, not at all.'

duced him to give this vote, it may be idle to conjecture them. We are persuaded, however, that he was favorable to the object sought to be attained, that is, the suppression of duelling; and only objected to the means employed to effect it. He might object to giving the Legislature a power of disfranchisement. A general power of that kind would be extremely dangerous, and such as no legislative body ought to be entrusted with. It might, in times of excitement, be exercised so as to disqualify an opposing party in politics, or an obnoxious sect in religion. The Chief Justice might be opposed to recognising a principle of that nature, however modified or restricted it might be, lest in the future an enlarged application of it should be demanded.

The respect and affection with which all parties in the Convention regarded him was very marked and observable. Any dissent from his opinions was almost invariably accompanied by some expression of veneration for his character, or attachment to his person. Indeed, it was said that there was some little inconsistency on the part of certain members, between their warm professions of respect for his wisdom and gratitude for his spirit of conciliation, and their votes, which by no means conformed to his. 'Up gets the gentleman from Loudon,' said B. Watkins Leigh, when discussing the question as to the basis of representation, 'and thanks his honored, and venerable, and venerated friend from Richmond (Judge Marshall), for saying that he will vote for their proposition; and immediately after, another gentleman from Loudon *made* an occasion to say that his highly venerated friend was his political father — that he took delight in following his lessons — and that it was gratifying to his heart to find, that his very venerable friend from Rich-

mond was willing to take what they proposed to give, if he could not get what he preferred. But, Sir, have we heard one word like a purpose to meet the generous spirit of that gentleman with a like generous spirit? Any, the least intimation, that if their proposition failed, they would accede to his? Not one word. . . . The generous and affectionate disposition of the gentleman from Richmond they applaud and countenance; but they — they will yield nothing! They were called upon to stand firm, and firm they stand.'

The Constitution finally adopted by the Convention was the result of mutual concession and compromise. Many of its features, considered separately, the Chief Justice could not approve. We have seen what opinions he entertained with regard to the question of suffrage, the basis of representation, and the independence of the Judiciary. His politics were conservative; but he was too wise not to know that it is an eternal law of political society, that concession and compromise are essential to its existence. 'All government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter. We balance inconveniences; we give and take; we remit some rights, that we may enjoy others; and we choose rather to be happy citizens, than subtle disputants.'[1] On these principles, the Chief Justice gave his cordial assent to the Constitution of Virginia, though, in several of its provisions, it ran counter to his opinions.

He was now in the seventy-fifth year of his age, and, apart from his duties as Chief Justice, he did not

[1] Burke. Speech on Conciliation with America

again mingle in public life. Indeed, with the exception of this Convention, and the Convention which assembled at Charlottesville in the previous year, to devise a system of internal improvements for the State, and of which he was a member, he had not done so since his accession to the Bench.

In the following chapter we shall trace his footsteps through the brief, remaining period of his life, and view him more closely as a man and a citizen.

CHAPTER XIV.

1829 — 1835.

CONCLUSION.

THE residence of the Chief Justice in Richmond was built by himself, and situated on Shockhoe Hill.[1]

[1] 'Among the oldest and most respectable of the occupants of Shockhoe Hill was the Ambler family, of which the *Treasurer, Jaquelin Ambler* was the head. His own residence yet stands, between Marshall and Clay streets, and is occupied by one of his sons-in-law. His daughters were married to gentlemen who built their dwellings not far from the paternal mansion, and a distinguished circle they formed.

'*Chief Justice* (*then* General) *Marshall* is entitled to priority. His residence yet stands on the street named in his honor, but the grounds have been reduced one-half, and a number of fine dwellings erected on them, between Eighth and Ninth streets.

'*Col. Edward Carrington*, also a soldier of the Revolution, married another of the Misses Ambler, a most excellent lady, as was each of her sisters. He was a member of the old Congress in 1785–6. The high estimation in which Col. Carrington was held by his personal friend, General Washington, is shown by his selection of him to be Quarter-Master General, when, in 1798, war with France was expected, and an organization of officers formed for the crisis. Under John Adams's Administration, Col. Carrington held the office of Commissioner of the Revenue of the United States for Virginia — direct taxes being then resorted to, in consequence of the depredations on our commerce. . . . Col. Carrington was a man of dignified deportment, which was well sustained by his tall and massive figure. He was a pure patriot, and pure in all the relations of life. He died October 28th, 1810, aged 61.

Though without the slightest architectural pretensions, it was commodious, and the grounds were ample.[1] No man was more attached to his home, and his judicial labors were so distributed, that he was enabled to spend the most of each year in the midst of his family. The session of the Supreme Court at Washington, and the Circuit Courts for Virginia and North Carolina, completed the annual round of his judicial duties.

Having considerable leisure, and being fond of agriculture, he purchased a farm three or four miles from Richmond, which he visited frequently, often on foot. He also owned a farm in Fauquier, his native county, to which he made an annual visit. His family and social attachments were warm and constant, and his periodical visits to Fauquier were always highly enjoyed both by himself and his numerous relatives and friends.

He took great delight in social, and even convivial pleasures. He was a member of The Barbacue, or Quoit Club, at Richmond, for more than forty years; and no one participated in the exercise and recreation that took place at their meetings with more zest and enthusiasm than himself. The Club was formed in 1788, and consisted of thirty members. They met once a fortnight, from May until October, at a place near 'Buchanan's Spring,' about a mile from the town. A

'*Daniel Call*, a distinguished lawyer, married another of the sisters Ambler, and his residence on the square between the Capitol and Broad street was taken down a few years ago, to be substituted by Mr. Valentine's large store.

'*George Fisher* married a fourth sister, and he, a retired merchant, and one of our oldest citizens, is the survivor of all that I have mentioned, and is the occupant of the patriarchal mansion of Treasurer Ambler.' — *Richmond in By-gone Days*, p. 64 *et seq.*

[1] About two acres.

visitor, who was present at a meeting of the Club, in the life-time of the Chief Justice, has given the following account of it: —

'The Club consists,' he says, 'of judges, lawyers, doctors, and merchants, and the Governor of the Commonwealth has a general invitation when he enters into office. What gave additional interest to this body, some years ago, was the constant attendance (as honorary members) of two venerable clergymen — one of the Episcopal, and the other of the Presbyterian Church — who joined in the innocent pastime of the day. They were pious and exemplary men, who discerned no sin in harmless gaiety. Quoits and backgammon are the only games indulged in, and one of the clergyman was, for many years, "cock of the walk' in throwing the *discus*. They are gone to their account, and have left a chasm that has not been filled.[1]

'Some years ago an amendment was made to the constitution, which admits the use of porter. Great opposition was made to this innovation, and the destruction of the Club was predicted as the consequence. The oppositionists, however, soon became as great consumers of malt and hops as their associates; and now they even consent to the introduction of wine at the last meeting of every year, provided there be "a shot in the locker." The members each advance ten dol-

[1] One of these clergymen was the Rev. Mr. Buchanan, an Episcopalian, and the other the Rev. Mr. Blair, a Presbyterian. 'These two clergymen were beloved throughout the community, for their many virtues. They were not ascetics, but liked to see their flocks gay and happy, and to promote and partake of such feelings within proper bounds. Each possessed a fund of wit, and was liberal in expending it.' — *Richmond in By-gone Days*, p. 120.

lars to the treasurer at the beginning of the season, and every member is entitled to invite any strangers as guests, on paying into the general fund one dollar for each; while the caterers of the day, consisting of two members in rotation, provide, and have the privilege of bringing each a guest (either citizen or non resident) at free cost.

'On the day I was present, dinner was ready at half-past three o'clock, and consisted of excellent meats and fish, well-prepared and well-served, with the vegetables of the season. Your veritable gourmand never fails to regale himself on his favorite *barbecue*, which is a fine fat pig, called "shoot," cooked on the coals, and highly-seasoned with cayenne; a dessert of melons and fruits follows, and punch, porter, and toddy, are the table liquors; but with the fruits comes on the favorite beverage of the Virginians, mint julep, in place of wine. I never witnessed more festivity and good humor than prevail at this Club. By the constitution, the subject of politics is forbidden, and each man strives to make the time pleasant to his companions. The members think they can offer no higher compliment to a distinguished stranger, than to introduce him to the Club; and all feel it a duty to contribute to his entertainment. It was refreshing to see such a man as Chief Justice Marshall laying aside the reserve of his dignified station, and contending with the young men at a game of quoits, with all the emulation of a youth.

'Many anecdotes are told of occurrences at these meetings. Such is the partiality for the Chief Justice, that it is said the greatest anxiety is felt for his success in the game by the bystanders; and, on one occasion, an old Scotch gentleman was called on to decide between his quoit and that of another member, who,

after seemingly careful measurement, announced, "*Mister Mareshall has it a leattle*," when it was visible to all that the contrary was the fact. A French gentleman (Baron Quenet) was at one time a guest, when the Governor, the Chief Justice, and several of the Judges of the High Court of Appeals, were engaged with others, *with coats off*, in a well-contested game. He asked, "if it was possible that the dignitaries of the land could thus intermix with private citizens;" and, when assured of the fact, he observed, with true gallican enthusiasm, that "he had never before seen the real beauty of republicanism."'[1]

Not one of the members, it is stated, was more punctual in his attendance at the meetings of the Club, than the Chief Justice, and not one who contributed more to their pleasantness. Even in advanced years, he was 'among the most skilful in throwing the *discus* as he was in discussion, . . . and it delighted his competitors as much as himself, to see him "ring the meg."'[2] 'He would hurl his iron ring of two pounds weight, with rarely erring aim, fifty-five or sixty feet; and, at some *chef d'œuvre* of skill in himself or his *partner*, would spring up and clap his hands, with all the light-hearted enthusiasm of boyhood.'[3] In his yearly visits to Fauquier, 'where the proper implements of his sport were not to be had, he still practised it among his rustic friends, with *flat stones* for quoits. A casual guest at a *barbacue* in that county — one of those rural entertainments so frequent among the country people of Virginia — soon after his arrival at the spot, saw an old man emerge from a

[1] American Turf Register for 1829.

[2] Richmond in By-gone Days, p. 189.

[3] Southern Literary Messenger, vol. ii., p. 188

thicket which bordered the neighboring brook, carrying as large a pile of these flat stones as he could hold between his right arm and his chin: he stepped briskly up to the company, and threw down his load among them, exclaiming, "There! Here are quoits enough us for all!" The stranger's surprise may be imagined, when he found that this plain and cheerful old man was the Chief Justice of the United States.'[1] In all his actions, there was the same winning simplicity, the same forgetfulness of self; 'his native humility, modesty, and candor never forsook him, even on surprise or provocation; nor was the least degree of assumption visible to the most scrutinizing eye, in any part of his conduct or discourse.'[2]

'He was a most conscientious man,' says Bishop Meade, 'in regard to some things which others might regard as too trivial to be observed. It was my privilege, more than once, to travel with him between Fauquier and Fredericksburgh, when we were both going to the lower country. On one occasion, the roads being in their worst condition, when we came to that most miry part called the "Black Jack," we found that the travellers through it had taken a nearer and better road through a plantation. The fence being down, or very low, I was proceeding to pass over, but he said we had better go round, although each step was a plunge, adding, that it was his duty, as one in office, to be very particular in regard to such things. As to some other matters, however, he was not so particular. Although myself never much given to dress or equipage, yet I was not at all ashamed to compare

[1] Southern Literary Messenger, vol. ii., p. 189.

[2] Burke of Sir Joshua Reynolds, and eminently true of Marshall.

with him during these travels, whether as to clothing, horse, saddle, or bridle. Servant he had none. Federalist as he was in politics, in his manners and habits he was truly republican. Would that all republicans were like him in this respect. . . . On one of my visits to Richmond, being in a street near his house, between daybreak and sunrise one morning, I met him on horseback, with a bag of clover-seed lying before him, which he was carrying to his farm, it being the time of sowing such seed.'[1]

The dress of the Chief Justice was always plain, and worn very carelessly. He usually wore blue-mixed woollen stockings, and a suit of black, of rather ordinary quality. He adhered to the mode of the last century, but his body was so ill-compacted, that it balked and marred the utmost skill of the shears. He was an early riser; 'and nothing was more usual, than to see him returning from market at sunrise, with poultry in one hand, and a basket of vegetables in the other.'[2] It is related that, while at the market on one occasion, a young man, who had recently removed to Richmond, was swearing violently because he could hire no one to take home his turkey. Marshall stepped up, and, ascertaining of him where he lived, replied, 'That is in my way, and I will take it for you.' When arrived at his dwelling, the young man inquired, 'What shall I pay you?' 'Oh, nothing,' was the rejoinder, 'you are welcome; it was on my way, and no trouble.' 'Who is that polite old gentleman who brought home my turkey for me?' inquired the other of a bystander, as Marshall stepped away.

[1] Old Churches and Families of Virginia, vol. ii., p. 222.

[2] Southern Literary Messenger, vol. ii., p. 188.

'That,' replied he, 'is John Marshall, Chief-Justice of the United States.'[1]

As we have already remarked, he held the Circuit Courts for Virginia and North Carolina, and nothing could present a greater contrast than the Lord Chancellor of England going in state to Westminster Hall, and the Chief Justice of the United States making his annual journey to Raleigh, in the latter State, to preside at the Federal Court held there. His style of travelling to and from that place, about 175 miles each way, 'was, for many years, in that primitive sort of vehicle, a stick gig (or chair, as it was then called), with one horse, and with no attendant.'[2]

His equipage, dress, and unpretending manner never would have suggested to a stranger the remotest idea of his position in life. He was once travelling in the northern part of Virginia, and about night-fall arrived at the village of Winchester, in Frederick County. He drove to what was then known as M'Guire's hotel. What occurred there has been thus related: —

'It is not long since a gentleman was travelling in one of the counties of Virginia, and, about the close of the day, stopped at a public house to obtain refreshment, and spend the night. He had been there but a short time, before an old man alighted from his gig, with the apparent intention of becoming his fellow-guest at the same house. As the old man drove up, he observed that both the shafts of his gig were

[1] Howe's Virginia Historical Collections, page 266.
[2] Richmond in By-gone Days, p. 64.

broken, and that they were held together by withes formed from the bark of a hickory sapling. Our traveller observed further, that he was plainly clad, that his knee-buckles were loosened, and that something like negligence pervaded his dress. Conceiving him to be one of the honest yeomanry of our land, the courtesies of strangers passed between them, and they entered the tavern. It was about the same time that an addition of three or four young gentlemen was made to their number — most, if not all of them, of the legal profession. As soon as they became conveniently accommodated, the conversation was turned by the latter upon an eloquent harangue which had that day been displayed at the Bar. It was replied by the other, that he had witnessed, the same day, a degree of eloquence no doubt equal, but that it was from the pulpit. Something like a sarcastic rejoinder was made to the eloquence of the pulpit; and a warm and able altercation ensued, in which the merits of the Christian religion became the subject of discussion. From six o'clock until eleven, the young champions wielded the sword of argument, adducing, with ingenuity and ability, everything that could be said pro and con. During this protracted period, the old gentleman listened with all the meekness and modesty of a child; as if he was adding new information to the stores of his own mind; or perhaps he was observing, with philosophic eye, the faculties of the youthful mind, and how new energies are evolved by repeated action; or, perhaps, with patriotic emotion, he was reflecting upon the future destinies of his country, and on the rising generation upon whom these future destinies must devolve; or, most probably, with a sentiment of moral and religious feeling, he was collecting an argument which — characteristic of himself — no

art would be "able to elude, and no force resist." Our traveller remained a spectator, and took no part in what was said.

'At last one of the young men, remarking that it was impossible to combat with long established prejudices, wheeled around, and with some familiarity exclaimed, "Well, my old gentleman, what think you of these things?" If, said the traveller, a streak of vivid lightning had at that moment crossed the room, their amazement could not have been greater than it was with what followed. The most eloquent and unanswerable appeal was made for nearly an hour, by the old gentleman, that he ever heard or read. So perfect was his recollection, that every argument urged against the Christian religion was met in the order in which it was advanced. Hume's sophistry on the subject of miracles was, if possible, more perfectly answered than it had already been done by Campbell. And in the whole lecture there was so much simplicity and energy, pathos and sublimity, that not another word was uttered. An attempt to describe it, said the traveller, would be an attempt to paint the sunbeams. It was now a matter of curiosity and inquiry who the old gentleman was. The traveller concluded it was the preacher from whom the pulpit eloquence was heard; but no, it was the *Chief Justice of the United States.*'[1]

If a stranger might not infer Marshall's greatness from his personal appearance, he could not long be in his company without perceiving his goodness, his un-

[1] This anecdote was originally published in the Winchester Republican, but preserved in durable form by being printed in Howe's Virginia Historical Collections, p. 275.

affected kindness, and genial nature. 'Meet him in a stage-coach, as a stranger, and travel with him a whole day, and you would only be struck with his readiness to administer to the accommodations of others, and his anxiety to appropriate the least to himself. Be with him, the unknown guest at an inn, and he seemed adjusted to the very scene, partaking of the warm welcome of its comforts, whenever found, and, if not found, resigning himself without complaint to its meanest arrangements. You would never suspect, in either case, that he was a great man; far less, that he was the Chief Justice of the United States. But if, perchance, invited by the occasion, you drew him into familiar conversation, you would never forget that you had seen and heard that "old man eloquent."'[1]

He was fond of the young, and they found in him a cheerful and most agreeable companion. 'One, whose first recollection of him referred to his triumphal entry (for such it was) into Richmond, on his return from France, and who, as a printer's boy, afterwards, for several years, was carrier of a newspaper to him, describes him as "remarkably fond of boys' company — always chatty — and always pleasant."[2] The same printer's boy having been transferred to Washington, in 1800, while Marshall was Secretary of State, renewed his acquaintance with him. 'Again,' he says, 'did the pleasing office of serving him with the "Washington Federalist" devolve on me. He resided in a brick building hardly larger than most of the kitchens now in use. I found him still the same plain, unostentatious John Marshall: always accessi-

[1] Story's Discourse, p. 52.

[2] Southern Literary Messenger, vol. ii., p. 189.

ble, and always with a smile on his countenance when I handed him the "Federalist." His kindness of manner won my affections; and I became devotedly attached to him.'[1]

No man was more just or more generous. In his dealings he was so scrupulous, as always to prefer his own loss to the possibility of his wronging another.[2] In his practice at the Bar, he never knowingly argued in defence of injustice, or took a legal advantage at the expense of moral honesty. He once endorsed a bond amounting to several thousand dollars; and the drawer having failed, he was called upon to pay it. He knew the bond could be avoided, because the holder had advanced the money at usurious interest; but he was utterly incapable of throwing off the moral obligation in that way, and he paid it.[3] His generosity was 'as large as his mind, and as unostentatious as his life.' We shall cite a single example. 'In passing through Culpepper, on his way to Fauquier, he fell in company with Mr. S., an old fellow-officer in the army of the Revolution. In the course of conversation, Marshall learned that there was a lien upon the estate of his friend to the amount of $3000, about due, and he was greatly distressed at the prospect of impending ruin. On bidding farewell, Marshall privately left a check for the amount, which being presented to Mr. S., after his departure, he, impelled by a chivalrous independence, mounted, and spurred his horse until he overtook his friend. He thanked him for his generosity, but refused to accept it.

[1] Southern Literary Messenger, vol. ii., p. 189.
[2] Ibid.
[3] Howe's Virginia Historical Collections, p. 266.

Marshall strenuously persisted in its acceptance, and the other as strongly persisted in not accepting. Finally, it resulted in a compromise, by which Marshall took security on the lien, but never called for pay.'[1] He was a member, for nearly half a century, of the Amicable Society at Richmond, which was formed to relieve strangers and wayfarers in distress, for whom the law made no provision. In short, his unobtrusive acts of generosity were innumerable, and flowed from the spontaneous goodness of his heart.

Upon the vexed and disagreeable, but important subject of slavery, his opinions were well known. He belonged to the Colonization Society, and manifested much interest in its objects. Though a slaveholder himself, he, nevertheless, regarded the institution as an incubus upon the prosperity of a State; an incubus whose effects the Colonization Society might palliate, but could not remove. Until the British emancipation in the West Indies, he always maintained that the abolition of slavery by legal enactment was impracticable; and that the evil was incurable, except by convulsion. After the experiment was actually made, he is said to have expressed hope as to the future of his beloved Virginia. Possibly, if he had lived to see the result in the West Indies, he might have anticipated less good from a similar experiment elsewhere. To promote the objects of the Colonization Society, he was in favor of an application to the several States for permanent aids; but his chief reliance was upon the General Government. 'It is undoubtedly of great importance,' he said, 'to retain the countenance and protection of the General Government. Some of our cruisers stationed on the coast of Africa

[1] Howe's Virginia Historical Collections, p. 266.

would, at the same time, interrupt the slave-trade — a horrid traffic, detested by all good men — and would protect the vessels and commerce of the colony from pirates who infest those seas. The power of the Government to afford this aid is not, I believe, contested. I regret that its power to grant pecuniary aid is not equally free from question. On this subject I have always thought, and still think, that the proposition made by Mr. King, in the Senate, is the most unexceptionable, and the most effective, that can be devised. . . . . The lands are the property of the United States, and have hitherto been disposed of by the Government under the idea of absolute ownership.'[1]

Though taking no part in the political controversies of the day, Marshall manifested to the last a warm interest in them. To the prevailing politics of his native State he was invincibly opposed. Towards the latter part of his life, he viewed, with something of gloom and despondency, the future prospects of his country, from the ascendency of principles which he believed would destroy the efficiency and perpetuity of the General Government. In a letter to Judge Story, two years before his death, he says, 'I have just finished reading your great work,[2] and wish it could be read by every statesman, and every would-be statesman in the United States. It is a comprehensive and an accurate commentary on our Constitution, formed in the spirit of the original text. In the South,

[1] Fifteenth Annual Report of the Colonization Society, p. 32. Letter from Marshall, December 14th, 1831.

[2] Commentaries on the Constitution; which were dedicated to Judge Marshall.

we are so far gone in political metaphysics, that I fear no demonstration can restore us to common sense. The word "State Rights," as expounded by the resolutions of 1798, and the report of 1799, construed by our Legislature, has a charm against which all reasoning is vain. Those resolutions, and that report, constitute the creed of every politician who hopes to rise in Virginia; and to question them, or even to adopt the construction given by their author, is deemed political sacrilege. The solemn and interesting admonitions of your concluding remarks will not, I fear, avail as they ought to avail against this popular frenzy. I am grateful for the very flattering terms in which you speak of your friend in many parts of this valuable work, as well as in the dedication. In despite of my vanity, I cannot suppress the fear, that you will be supposed by others, as well as myself, to have consulted a partial friendship farther than your deliberate judgment will approve. Others may not contemplate this partiality with as much gratification as its object.'[1]

In a subsequent letter to Judge Story, he says: — 'On my return, a day or two past, from an annual visit to our mountains, I had the real gratification of receiving a number of the New England Magazine for August last, containing an Essay, entitled "Statesmen: their Rareness and Importance," forwarded to me by yourself, and thank you truly for the real pleasure afforded by its perusal. The justness and solidity of its sentiments, the distinguished individual who is selected as an example of the real statesman,[2] and the

[1] Story's Life and Letters, vol. ii., p. 135. July 31st, 1833.

[2] Daniel Webster.

kind notice taken of an old friend who is under so many obligations to you, designate the author as certainly as if his name had been affixed to the work.

'It is in vain to lament, that the portrait which the author has drawn of our political and party men is, in the general, true. Lament it as we may, much as it may wound our vanity or our pride, it is still, in the main, true; and will, I fear, so remain. . . . . In the South, political prejudice is too strong to yield to any degree of merit; and the great body of the nation contains, at least appears to me to contain, too much of the same ingredient. To men who think as you and I do, the present is gloomy enough; and the future presents no cheering prospect. The struggle now maintained in every State in the Union seems to me to be of doubtful issue; but should it terminate contrary to the wishes of those who support the enormous pretensions of the Executive, should victory crown the exertions of the champions of constitutional law, what serious and lasting advantage is to be expected from this result? In the South (things may be less gloomy with you) those who support the Executive do not support the Government. They sustain the personal power of the President, but labor incessantly to impair the legitimate powers of the Government. Those who oppose the violent and rash measures of the Executive (many of them nullifiers, many of them seceders) are generally the bitter enemies of a constitutional government. Many of them are the avowed advocates of a league; and those who do not go the whole length, go great part of the way. What can we hope for in such circumstances? As far as I can judge, the Government is weakened, whatever

party may prevail. Such is the impression I receive from the language of those around me.'[1]

Though strongly opposed to the general policy of Jackson's Administration, and the principles upon which it was conducted, the Chief Justice warmly approved his proclamation and message against nullification. Secession and nullification he regarded as political heresies of the most dangerous character; as theories utterly subversive of all stability in our Government, and at war with its fundamental principles. Speaking of a dinner at the President's, about the time of the debate on the Force bill, Judge Story says, 'I forgot to say, that, notwithstanding I am "the most dangerous man in America,"[2] the President specially invited me to drink a glass of wine with him. But, what is more remarkable, since his last proclamation and message, the Chief Justice and myself have become his warmest supporters, and shall continue so just as long as he maintains the principles contained in them. Who would have dreamed of such an occurrence.'[3]

Marshall was fond of books, which, in his intervals of leisure, he read 'for delight.' His familiarity with general literature was extensive. The great masters of English letters were his favorite companions. He read novels with intense interest, and would spend the night over their alluring pages. He had formed a very high estimate of female genius, and the productions of female authors he read with an interest in

[1] Story's Life and Letters, vol. ii., p. 172. October 6th, 1834.
[2] So styled by General Jackson.
[3] Story's Life and Letters, vol. ii., p. 117. January 27th, 1833.

some sort proportioned to his admiration of their sex. Acknowledging the receipt of a discourse by Judge Story, he says, 'I have read it with real pleasure, and am particularly gratified with your eulogy on the ladies. It is matter of great satisfaction to me to find another judge who, though not as old as myself, thinks justly of the fair sex, and commits his sentiments to print. I was a little mortified, however, to find that you had not admitted the name of Miss Austin into your list of favorites. I had just finished reading her novels when I received your discourse, and was so much pleased with them, that I looked in it for her name, and was rather disappointed at not finding it. Her flights are not lofty, she does not soar on eagles' wings, but she is pleasing, interesting, equable, and yet amusing. I count on your making some apology for this omission.'[1]

The Chief Justice had imbibed, in his youth, a love of poetry; and the 'sweetly uttered wisdom' of song he found a solace and delight in his age. No doubt these studies contributed very much to preserve his intellect in that vigor and freshness which it exhibited down to the very close of his life. His mind was not suffered to grow rigid by dwelling only on professional topics; but was variously exercised, which is 'healthful and sovereign for the understanding.'

The constitution of the Chief Justice was robust, and his health good. From youth to age, he suffered but little from sickness. In his latter years, however, he was afflicted with that most excruciating malady, the stone. In October, 1831, he visited Philadelphia, and submitted to an operation by Dr. Physick,

[1] Story's Life and Letters, vol. i., p. 506. November 26th, 1826.

which gave him relief. 'This case,' says Dr. Randolph, 'was attended with singular interest, in consequence of the exalted position of the patient, his advanced age, and the circumstance of there being upwards of one thousand calculi taken from his bladder. . . . . It will be readily admitted that, in consequence of Judge Marshall's very advanced age, the hazard attending the operation, however skilfully performed, was considerably increased. I consider it but an act of justice, due to the memory of that good and great man, to state that, in my opinion, his recovery was, in a great degree, owing to his extraordinary self-possession, and to the calm and philosophical views which he took of his case, and the various circumstances attending it. It fell to my lot to make the necessary preparations. In the discharge of this duty, I visited him on the morning of the day fixed on for the operation, two hours previously to that at which it was to be performed. Upon entering his room, I found him engaged in eating his breakfast. He received me with a pleasant smile upon his countenance, and said, "Well, Doctor, you find me taking breakfast, and I assure you I have had a good one. I thought it very probable that this might be my last chance, and therefore I was determined to enjoy it, and eat heartily." I expressed the great pleasure which I felt at seeing him so cheerful, and said that I hoped all would soon be happily over. He replied to this, that he did not feel the least anxiety or uneasiness respecting the operation or its result. He said that he had not the slightest desire to live, laboring under the sufferings to which he was then subjected; that he was perfectly ready to take all the chances of an operation, and he knew there were many against him; and that, if he could be relieved by it, he was

willing to live out his appointed time, but if not, would rather die, than hold existence accompanied with the pain and misery which he then endured. After he had finished his breakfast, I administered to him some medicine: he then inquired at what hour the operation would be performed. I mentioned the hour of eleven. He said, "Very well; do you wish me now for any other purpose, or may I lie down and go to sleep?" I was a good deal surprised at this question, but told him that if he could sleep it would be very desirable. He immediately placed himself upon the bed and fell into a profound sleep, and continued so until I was obliged to rouse him in order to undergo the operation. He exhibited the same fortitude, scarcely uttering a murmur throughout the whole procedure, which, from the peculiar nature of his complaint, was necessarily tedious.'[1]

His situation had been considered dangerous, and, throughout the country, caused much anxiety: his happy recovery occasioned corresponding joy. 'Pray tell the Chief Justice,' wrote Judge Story to his friend Peters, 'how deeply every one here has been interested in his situation. He is beloved and reverenced here beyond all measure, though not beyond his merits. Next to Washington, he stands the idol of all good men. And who so well deserves it? I look upon his judicial life as good now for at least six years longer?'[2]

Though recovering himself, he received, soon after,

[1] Memoir of Dr. P. S. Physick, by J. Randolph, M. D., p. 96, *et seq.*

[2] Story's Life and Letters, vol. ii., p. 70. Letter to Richard Peters, October 29th, 1831.

a severe blow in the death of his wife, to whom he was ardently attached. She had suffered much from ill-health, and the tender and assiduous attention he paid to her, says Bishop Meade, was the most interesting and striking feature in his domestic character. 'Mrs. Marshall was nervous in the extreme. The least noise was sometimes agony to her whole frame, and his perpetual endeavor was to keep the house, and yard, and outhouses, as free as possible from the slightest cause of distressing her; walking himself, at times, about the house and yard without shoes. On one occasion, when she was in her most distressing state, the town authorities of Richmond manifested their great respect for him, and sympathy for her, by having either the town-clock or town-bell muffled.'[1]

Marshall first met his future wife at York, while on a visit to his father, Colonel Marshall, who was the commanding officer at that place. She was but fourteen years of age at the time, and it is stated to have been a case of love at first sight. It is also said, that he endeared himself to her family, 'notwithstanding his slouched hat, and negligent and awkward dress, by his amiable manners, fine talents, and especially his love for poetry, which he read to them with deep pathos.' In proof of the ardor of his character, and the tenderness of his attachment to his intended wife, his sister-in-law, Mrs. Carrington, remarks, that he often said to her, 'that he looked with astonishment on the present race of lovers,' so totally unlike what he had been himself. On his marriage, after paying the minister his fee, his sole remaining fortune was a guinea.[2]

[1] Old Churches and Families of Virginia, vol. ii., p 222.
[2] Ibid., vol. i., p. 99, note.

Mrs. Marshall died on the 25th of December, 1831. Her loss weighed heavily on his spirits. 'On going into the Chief Justice's room this morning,' says his friend, and brother judge, 'I found him in tears. He had just finished writing out for me some lines of General Burgoyne, of which he spoke to me last evening as eminently beautiful and affecting. I asked him to change the purpose, and address them to you, which he instantly did, and you will find them accompanying this. I saw at once that he had been shedding tears over the memory of his own wife; and he has said to me several times during the term, that the moment he relaxes from business he feels exceedingly depressed, and rarely goes through a night without weeping over his departed wife. She must have been a very extraordinary woman, so to have attached him, and I think he is the most extraordinary man I ever saw, for the depth and tenderness of his feelings.'[1]

The following affecting tribute to her memory was written by himself, December 25th, 1832: —

'This day of joy and festivity to the whole Christian world is, to my sad heart, the anniversary of the keenest affliction which humanity can sustain. While all around is gladness, my mind dwells on the silent tomb, and cherishes the remembrance of the beloved object which it contains.

'On the 25th of December, 1831, it was the will of Heaven to take to itself the companion who had

[1] Story's Life and Letters, vol. ii., p. 86. Letter to Mrs. Story, March 4th, 1832.

sweetened the choicest part of my life, had rendered toil a pleasure, had partaken of all my feelings, and was enthroned in the inmost recess of my heart. Never can I cease to feel the loss, and to deplore it. Grief for her is too sacred ever to be profaned on this day, which shall be, during my existence, marked by a recollection of her virtues.

'On the 3d of January, 1783, I was united by the holiest bonds to the woman I adored. From the moment of our union to that of our separation, I never ceased to thank Heaven for this, its best gift. Not a moment passed in which I did not consider her as a blessing from which the chief happiness of my life was derived. This never-dying sentiment, originating in love, was cherished by a long and close observation of as amiable and estimable qualities as ever adorned the female bosom. To a person which, in youth, was very attractive, to manners uncommonly pleasing, she added a fine understanding, and the sweetest temper which can accompany a just and modest sense of what was due to herself. She was educated with a profound reverence for religion, which she preserved to her last moments. This sentiment, among her earliest and deepest impressions, gave a coloring to her whole life. Hers was the religion taught by the Saviour of man. She was a firm believer in the faith inculcated by the Church [Episcopal] in which she was bred.

'I have lost her, and with her have lost the solace of my life! Yet she remains still the companion of my retired hours, still occupies my inmost bosom. When alone, and unemployed, my mind still recurs to her. More than a thousand times, since the 25th of December, 1831, have I repeated to myself the

beautiful lines written by General Burgoyne, under a similar affliction, substituting "Mary" for "Anna:"

"'"Encompassed in an angel's frame,
An angel's virtues lay;
Too soon did Heaven assert its claim,
And take its own away!
My Mary's worth, My Mary's charms,
Can never more return!
What now shall fill these widowed arms?
Ah me! My Mary's urn!
Ah me! Ah me! My Mary's urn!"'[1]

At the ensuing term of the Supreme Court (January, 1833), the Chief Justice was at his post, and, though he had now attained the seventy-eighth year of his age, his health seemed fully re-established. 'The Court opened on Monday last,' says Judge Story, 'and all the Judges were present, except Judge Baldwin. They were in good health, and the Chief Justice especially looked more vigorous than usual. He seemed to revive, and enjoy anew his green old age. He brought with him, and presented to each of us, a copy of the new edition of his Life of Washington, inscribing in the fly-page of mine a very kind remark. . . Having some leisure on our hands, the Chief Justice and myself have devoted some of it to attendance upon the theatre, to hear Miss Fanny Kemble, who has been in the city the past week. We attended on Monday night, and, on the Chief Justice's entrance into the box, he was cheered in a marked manner. He behaved as he always does, with extreme modesty, and seemed not to know that the compliment was designed for him. We have seen Miss Kemble as Julia,

[1] Old Churches and Families of Virginia, vol. ii., p. 223, note.

in the Hunchback, and as Mrs. Haller, in the Stranger. . . . I have never seen any female acting at all comparable to hers. She is so graceful, that you forget that she is not very handsome. In Mrs. Haller, she threw the whole audience into tears. The Chief Justice shed them in common with younger eyes.'[1]

The celebrity of Marshall, the reverence and affection with which he was regarded by his own countrymen, naturally made him an object of interest to strangers visiting the United States. And he inspired in them, as in every one who knew him, and became acquainted with his character, sentiments of veneration and esteem. Miss Martineau was in Washington the winter preceding his death, and she has thus recorded her impressions of his appearance and conversation: —

'With Judge Story,' she says, 'sometimes came the man to whom he looked up with feelings little short of adoration; the aged Chief-Justice Marshall. There was almost too much mutual respect in our first meeting; we knew something of his individual merits and services; and he maintained through life, and carried to his grave, a reverence for woman as rare in its kind as in its degree. It had all the theoretical fervour and magnificence of Uncle Toby's, with the advantage of being grounded upon an extensive knowledge of the sex. He was the father and the grandfather of woman; and out of this experience he brought, not only the love and pity which their offices and position command, and the awe of purity which they excite in the

[1] Story's Life and Letters, vol. ii., p. 116. Letter to Mrs. Story, January 2d, 1833.

minds of the pure, but a steady conviction of their intellectual equality with men; and, with this, a deep sense of their social injuries. Throughout life he so invariably sustained their cause, that no indulgent libertine dared to flatter and humor, no sceptic, secure in the possession of power, dared to scoff at the claims of woman in the presence of Marshall, who, made clear-sighted by his purity, knew the sex far better than either.

'How delighted we were to see Judge Story bring in the tall, majestic, bright-eyed old man! — old by chronology, by the lines on his composed face, and by his services to the republic; but so dignified, so fresh, so present to the time, that no feeling of compassionate consideration for age dared to mix with the contemplation of him.

'The first evening, he asked me much about English politics, and especially whether the people were not fast ripening for the abolition of our religious establishment — an institution which, after a long study of it, he considered so monstrous in principle, and so injurious to true religion in practice, that he could not imagine that it could be upheld for anything but political purposes. There was no prejudice here, on account of American modes being different; for he observed that the clergy were there, as elsewhere, far from being in the van of society, and lamented the existence of much fanaticism in the United States: but he saw the evils of an establishment the more clearly, not the less, from being aware of the faults in the administration of religion at home. The most animated moment of our conversation was when I told him I was going to visit Mr. Madison, on leaving Washington. He instantly sat upright in his chair, and with beaming eyes began to praise Mr. Madison. Madison received

the mention of Marshall's name in just the same manner: yet these men were strongly opposed in politics, and their magnanimous appreciation of each other underwent no slight or brief trial.'[1]

In the spring of this year (1835), and after the return of the Chief Justice to Virginia, another English traveller spent a week at Richmond, enjoying the hospitality of its inhabitants; and to his pen we are indebted for the following sketch of the Chief Justice:

'Judge Marshall, who is Chief Justice of the Supreme Court, and, in fact, Lord Chancellor of the United States, is one of the most remarkable and distinguished men that has adorned the Legislature of either shore of the Atlantic. He began life as a soldier; and, during the American war, served in the militia, where he rose to the rank of General:[2] after which he came to the Bar, and passed through all its gradations to his present high position, which is, in my opinion, the proudest that an American can enjoy, not excepting that of President; inasmuch as it is less subject *arbitrio popularis aurœ;* and as the Court over which he presides can affirm and decide what is and what is not the Constitution of the United States.

'The Judge is a tall, venerable man, about eighty years of age, his hair tied in a cue, according to olden custom, and with a countenance indicating that simplicity of mind and benignity which so eminently distinguish his character. As a judge he has no rival, his knowledge being profound, his judgment clear and

[1] Martineau's Western Travel, vol. i., p. 247, English ed.

[2] This is erroneous. *After* the war, and not *during* the war, he served in the militia, and was appointed a militia general.

just, and his quickness in apprehending either the fallacy or truth of an argument as surprising. I had the pleasure of several long conversations with him, and was struck with admiration at the extraordinary union of modesty and power, gentleness and force, which his mind displays. What he knows he communicates without reserve; he speaks with a clearness of expression, and in a tone of simple truth, which compel conviction; and on all subjects on which his knowledge is not *certain*, or which admit of doubt or argument, he delivers his opinion with a candid diffidence, and with a deference for that of others, amounting almost to timidity: still, it is a timidity which would disarm the most violent opponent, and win respect and credence from any auditor. I remember having often observed a similar characteristic attributed to the immortal Newton. The simplicity of his character is not more singular than that of his life; pride, ostentation, and hypocrisy are "Greek to him;" and he really lives up to the letter and spirit of republicanism, while he maintains all the dignity due to his age and office.

'His house is small, and more humble in appearance than those of the average of successful lawyers or merchants. I called three times upon him; there is no bell to the door: once I turned the handle of it, and walked in unannounced; on the other two occasions he had seen me coming, and had lifted the latch and received me at the door, although he was at the time suffering from some severe contusions received in the stage while travelling on that road from Fredericksburgh to Richmond, which I have before described. I verily believe there is not a particle of vanity in his composition, unless it be of that venial and hospitable nature which induces him to pride him-

self on giving to his friends the best glass of Madeira in Virginia. In short, blending, as he does, the simplicity of a child and the plainness of a republican with the learning and ability of a lawyer, the venerable dignity of his appearance would not suffer in comparison with that of the most respected and distinguished-looking peer in the British House of Lords.'[1]

This absence of vanity, this childlike simplicity, this unpretending manner, that distinguished Marshall, and which every one remarked, often induced a feeling of disappointment on a first introduction to him. He used no tricks 'to maintain the credit of his sufficiency;" and never talked to display his knowledge or ability, or 'to get opinion,' as Bacon expresses it. There was an utter unconsciousness of self in his manner; all was simple, natural, and unaffected. He presumed nothing upon his age or station, and his ordinary conversation, though agreeable, sensible, and suitable to the occasion, did not betoken the depth of his mind. It was only in the company of his intimate friends, and when the conversation was directed to some subject that elicited discussion, that the powers of his mind were displayed. The following anecdote may be cited as an example: —

'Mr. Dexter,' says Judge Story, 'was once in company with Fisher Ames and Chief Justice Marshall. The latter commenced a conversation, or rather an opinion (for he was almost solus in the dialogue), which lasted some three hours. On breaking up, the

[1] Travels in North America, by the Honorable Charles Augustus Murray, vol. i., p. 158. Murray, by the bye, was a grandson of Lord Dunmore

two former commenced, on their way homeward, praising the depth and learning of their noble host. Said Ames, after a short talk, "to confess the truth, Dexter, I have not understood a word of his argument for half an hour." "And I," good-humoredly rejoined Dexter, "have been out of my depth for an hour and a half."'[1]

The Chief Justice fearing the effects of age upon his mind, and anxious that, 'in life's last scenes,' he might not exhibit another instance of the 'follies of the wise,' had charged his confidential friends to let him know whenever they perceived the slightest abatement in his intellectual vigor, and he would at once retire from the Bench. But they never had occasion to perform that delicate office. His intellect remained unclouded and undimmed to the last moment. At the session of the Supreme Court, however, in the winter of 1835, it was apparent that his health was rapidly declining. His complaints were very much aggravated by the injuries received while travelling in the stage between Fredericksburgh and Richmond, on his return home at the close of the term. He suffered great pain through the spring; but, early in June, experienced a delusive interval of convalescence. It did not last long, and, at the earnest solicitation of friends, he revisited Philadelphia to seek that relief which the medical skill of that city had formerly afforded him. He was accompanied by three of his sons,[2] and through-

[1] Story's Life and Letters, vol. ii., p. 404.

[2] His eldest son, Mr. Thomas Marshall, who was 'highly esteemed for his talents, his many virtues, and his exemplary and useful life,' was killed at Baltimore by the fall of a chimney, while on his way to attend the death-bed of his father. He died June 28th. This melancholy calamity was considerately concealed from the dying parent.

out his illness had every consolation from filial attention, and from the kindness and attention of his numerous friends at Philadelphia, who manifested the deepest interest in his situation, and did all in their power to alleviate it. But it was evident, from the moment of his arrival in the city, that the sands of his life had nearly run out. The cause of his death was a very diseased condition of the liver, which was enormously enlarged, and contained several tuberculous abscesses of great size; its pressure upon the stomach had the effect of dislodging this organ from its natural situation, and compressing it in such a manner, that, for some time previous to his death, it would not retain the smallest quantity of nutriment.[1] He was conscious of his approaching end, and viewed it with perfect composure. Two days before his death, and in full view of it, with a modesty characteristic of himself, he wrote the following inscription for his monumental tablet: — 'John Marshall, son of Thomas and Mary Marshall, was born on the 24th of September, 1755, intermarried with Mary Willis Ambler the 3d of January, 1783, departed this life the —— day of ——, 18—.'

He expired without a struggle, on Monday, the 6th of July, 1835, about six o'clock in the evening. The news of his death elicited everywhere manifestations of sorrow and respect. The citizens of Philadelphia assembled in town meeting to express their sentiments on the occasion. The venerable Bishop White, then in the 88th year of his age, presided. Suitable resolutions were adopted, and the whole proceedings evinced the respect and reverence with which his character was regarded.

[1] Randolph's Memoir of Dr. Physick, p. 101.

His remains were conveyed to Richmond, accompanied by a committee of the Philadelphia Bar. On their arrival at that place they were met by an imposing procession composed of the military, the Masonic brethren, the civil authorities, and citizens, and escorted to his residence, where the funeral service was performed by the Right Reverend Bishop Moore, in a most fervent and feeling manner. He was buried near the ashes of his wife, in what was called the New Burying-ground. His statue, representing Justice, occupies one of the six pedestals that surround the main column of the Washington Monument erected in the Capitol square at Richmond. Certainly nothing could be more appropriate.

Judge Marshall was a sincere friend to religion, and a constant attendant upon its ministrations. Brought up in the Episcopal Church, he adhered to it through life, though not until a short time before his death a believer in its fundamental doctrines.

'I often visited,' says the Rev. Mr. Norwood, 'Mrs. General Harvey during her last sickness. From her I received this statement. She was much with her father [Judge Marshall] during the last months of his life, and told me that the reason why he never communed was, that he was a Unitarian in opinion, though he never joined their society. He told her that he believed in the truth of the Christian revelation, but not in the divinity of Christ; therefore he could not commune in the Episcopal Church. But, during the last months of his life, he read Keith on Prophecy, where our Saviour's divinity is incidentally treated, and was convinced by his work, and the fuller investigation to which it led, of the supreme

divinity of the Saviour. He determined to apply for admission to the communion of our Church—objected to communion in private, because he thought it his duty to make a public confession of the Saviour; and, while waiting for improved health to enable him to go to the Church for that purpose, he grew worse, and died, without ever communing. Mrs. Harvey was a lady of the strictest probity, the most humble piety, and of a clear, discriminating mind; and her statement, the substance of which I give you accurately (having reduced it to writing), may be entirely relied on.

I remember to have heard Bishop Moore repeatedly express his surprise (when speaking of Judge Marshall), that, though he was so punctual in his attendance at church, and reproved Mr. ——, and Mr. ——, and Mr. ——, when they were absent, and knelt during the prayers and responded fervently, yet he never communed. The reason was that he gave to his daughter, Mrs. Harvey. She said he died an humble, penitent believer in Christ, according to the orthodox creed of the Church. . . .

'P. S. — Another fact, illustrating the lasting influence of maternal instruction, was mentioned by Mrs. Harvey. Her father told her that he never went to bed without concluding his prayers with those which his mother taught him when a child, viz., the Lord's Prayer, and the prayer beginning, "Now I lay me down to sleep."'[1]

I can never forget,' says Bishop Meade, 'how he would prostrate his tall form before the rude low

[1] Old Churches and Families of Virginia, vol. ii., p. 223, note. Letter from Rev. William Norwood to Bishop Meade.

benches without backs, at Cool Spring Meeting-house, in the midst of his children, and grandchildren, and his old neighbors. In Richmond he always set an example to the gentlemen of the same conformity, though many of them did not follow it. At the building of the Monumental Church he was much incommoded by the narrowness of the pews, which partook too much of the modern fashion. Not finding room for his whole body within the pew, he used to take his seat nearest the door of his pew, and throwing it open, let his legs stretch a little into the aisle.' [1]

He not only conformed to the ceremonies of religion, but his whole life evinced virtuous principles and affections. 'He had no frays in his boyhood. He had no quarrels or outbreakings in manhood. He was the composer of strifes. He spoke ill of no man. He meddled not with their affairs. He viewed their worst deeds through the medium of charity. He had eight sisters and six brothers, with all of whom, from youth to age, his intercourse was marked by the utmost kindness and affection; and although his eminent talents, high public character, and acknowledged usefulness, could not fail to be a subject of pride and admiration to all of them, there is no one of his numerous relations, who has had the happiness of a personal association with him, in whom his purity, simplicity, and affectionate benevolence, did not produce a deeper and more cherished impression, than all the achievements of his powerful intellect.' 'In private life he was upright, and scrupulously just in all his transactions. His friendships were ardent, sincere, and constant — his charity and benevolence unbounded. He was fond

[1] Old Churches and Families of Virginia, vol. ii., p. 221, note.

of society, and, in the social circle, cheerful and unassuming. He participated freely in conversation, but, from modesty, rather followed than led. Magnanimous and forgiving, he never bore malice, of which illustrious instances might be given. A republican from feeling and judgment, he loved equality, abhorred all distinctions founded upon rank instead of merit, and had no preference for the rich over the poor. Religious from sentiment and reflection, he was a Christian, believed in the Gospel, and practised its tenets.'[1]

[1] The testimony of a kinsman and of a friend. Vide, Binney's Eulogy on John Marshall, p. 68.

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